(1)

Supreme Court, U.S.
FILED

97 14 22 MAR 2 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF THURSTON, NEBRASKA, and MARK CASEY, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska,

Petitioners,

vs.

HOLLIS D. STABLER, JR.; SHARON FREEMONT; OMAHA TRIBAL HISTORICAL PROJECT, INC.; and RED FEATHER FAMILY SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY D. BARTON
HARDING, SHULTZ & DOWNS
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel of Record for Petitioners Thurston County, Nebraska and Mark Casey

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

49 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals erred in holding that in a case arising under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the existence of "proportionality" should be determined on the basis of the minority's share in the total population.

2. Whether the Eighth Circuit Court of Appeals erred in holding that rough proportionality cannot exist where the difference between the percentage of minority voters in the voting-age population, and the percentage of districts in which the minority constitutes an effective voting majority, is more than two percent.

3. Whether the Eighth Circuit Court of Appeals erred in effectively mandating proportional representation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

REPORT OF OPINION 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

COURSE OF PROCEEDINGS IN THE DISTRICT COURT 5

COURSE OF PROCEEDINGS ON APPEAL 9

ARGUMENT 10

1. AN IMPORTANT FEDERAL QUESTION EXISTS, UNRESOLVED BY THIS COURT, CONCERNING THE PROPER METHOD FOR DETERMINING THE EXISTENCE OF ROUGH PROPORTIONALITY 10

(a) The Existence of Proportionality Should be Determined on the Basis of Voting-age Population 12

(b) The Eighth Circuit Court of Appeals Erred in Holding that Rough Proportionality Cannot Exist Where the Difference Between the Percentage of Minority Voters in the Voting-Age Population, and the Percentage of Districts in Which the Minority Constitutes an Effective Voting Majority, is More than 2% 17

TABLE OF CONTENTS – Continued

Page

(c) The Eighth Circuit Decision Effectively Mandates Proportional Representation Because the Eighth Circuit Found "Intentional Discrimination" Based Solely on the County's Failure to Provide Native Americans with Representation in Numbers Equal to Their Proportion in the Population 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

African-American Voter Rights Legal Defense Fund v. Villa, 54 F.3d 1345 (8th Cir. 1995), *reh'g denied*, 999 F.2d 1301, *cert. denied*, ___ U.S. ___, 116 S. Ct. 913 (1996) 8, 13, 14

City of Mobile v. Bolden, 446 U.S. 55 (1980) 22

Johnson v. DeGrandy, 512 U.S. 997 (1994)..... *passim*

Johnson v. McDole, 394 F. Supp. 1197 (W.D. La. 1975), *appeal dismissed*, 526 F.2d 710 (5th Cir. 1976)..... 8

NAACP v. Austin, 857 F.Supp. 560 (E.D. Mich. 1994)..... 13

Rural West Tennessee African-Am. Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096 (W.D. Tenn.), *aff'd sub nom. Rural West Tennessee African-Am. Affairs Council, Inc. v. Sundquist*, ___ U.S. ___, 116 S. Ct. 42 (1995) 19

Schmueser v. Burk Burnett Bank, 937 F.2d 1025 (5th Cir. 1991) 8

Shaw v. Hunt, 861 F. Supp. 408 (E.D. N.C. 1994), *rev'd on other grounds*, 517 U.S. 899 (1996)..... 13

Spangle v. Ming Tah Elec. Co., 866 F.2d 102 (8th Cir. 1989)..... 8

Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997) 1

Thornburg v. Gingles, 478 U.S. 30 (1986) 5, 6, 9

Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1973 1

OTHER

B. Grofman, L. Handley, & R. Niemi, Minority Representation and the Quest for Voting Equality, 136 (1992) 23

THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) 18

WEBSTER'S NEW COLLEGIATE DICTIONARY (1981) 18

REPORT OF OPINION

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Stabler v. County of Thurston*, 129 F.3d 1015 (8th Cir. 1997).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 1, 1997. (App. 49). The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 1331.

STATUTES INVOLVED

This action was brought under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or

> political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

In *Johnson v. DeGrandy*, 512 U.S. 997 (1994), this Court held that ordinarily no violation of § 2 of the Voting Rights Act can be found

> where, in spite of continuing discrimination and racial-bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. . . .

Id. at 1000. Because the issue was not dispositive in *Johnson*, this Court left open the question whether the existence of rough proportionality might be judged using some other population base, such as the minority's share in the total population, or the minority's share in the population consisting of registered voters, etc. *Id.* at 1017 n. 14.

This case presents the issue which was specifically left open in *Johnson*. In the present case, the Eighth Circuit Court of Appeals held that the existence of proportionality may be judged on the basis of the minority's share in the total population. (App. 11-12.)

The Eighth Circuit Court of Appeals also concluded that, even if the existence of "rough proportionality" was judged on the basis of voting-age population, rough proportionality cannot exist where the difference between the percentage of minority voters in the voting-age population, and the percentage of districts in which the minority constitutes an effective voting majority, is more than 2%. (App. 12-13.) Specifically, the Eighth Circuit determined that "rough proportionality" did not exist where Native Americans had, since at least 1980, constituted an effective voting majority in two of seven (28.57%) supervisor districts, and constituted 35.9% of the voting-age population. The Eighth Circuit held that rough proportionality would exist only if Native Americans formed effective voting majorities in at least three of seven (42.86%) of the supervisor districts. (App. 12-13.)

The Thurston County Board of Supervisors is composed of seven members elected from single-member districts, with each member holding a four-year term. Members are nominated in partisan primary elections and elected in general elections in even-numbered years. Representatives from districts 1, 3, 5 and 7 are elected in gubernatorial election years, while members of the board from districts 2, 4 and 6 are elected in presidential election years. (App. 4.) Native Americans constitute 35.9% of the voting-age population in Thurston County and

43.92% of the total population according to the 1990 census. (App. 5.)

Following the 1990 census, the County Board of Supervisors created new supervisor districts. Districts 4 and 6 are majority-minority districts. Native Americans constitute 82.8% of the voting-age population (VAP) in district 4 and 94.5% of the voting-age population in district 6. Non-Native Americans constitute a majority of the VAP in the other five districts. Native Americans represent a substantial portion of the voting-age population in districts 2, 3 and 5 (36.9%, 22.7%, and 36.4%, respectively). (App. 5.)

The plaintiffs in the present action are Native Americans who reside in Thurston County, Nebraska. The plaintiffs filed suit in the United States District Court for the District of Nebraska claiming a violation of their rights under § 2 of the Voting Rights Act. Specifically, the plaintiffs alleged that the County should have created three Native-American majority districts, and that the County had unlawfully diluted the voting strength of Native Americans by continuing to maintain two majority-minority supervisor districts. (App. 32.)

It is undisputed that Native Americans in Thurston County constitute an effective voting majority in supervisor districts 4 and 6, and that Native Americans have regularly been able to elect their candidates of choice in those two supervisor districts. (App. 5.) Thus, with 35.9% of the VAP, Native Americans effectively control 28.57% of the seats on the County Board of Supervisors. If a third majority-minority district were created, then Native

Americans would effectively control 42.86% of the seats on the County Board of Supervisors.

The plaintiffs also alleged that the County had engaged in "intentional" discrimination, and thereby had violated the plaintiffs' rights under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. (App. 26.)

The County defended against plaintiffs' claims by maintaining that the plaintiffs could not establish a case under the totality of the circumstances test set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Relying on the decision of this Court in *Johnson v. DeGrandy, supra*, the County maintained that Native-American voters formed an effective voting majority in a number of districts roughly proportional to their respective share in the voting-age population. (App. 40-42.)

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

This case was tried in the United States District Court for the District of Nebraska from May 30, 1995, until June 2, 1995. (App. 7.) On August 29, 1995, the district court issued a memorandum opinion holding that the County had violated the plaintiffs' rights under § 2 of the Voting Rights Act. (App. 25.) The decision of the district court is unreported. The County was ordered to create a new districting plan with three majority-minority districts. (App. 45.)

The district court concluded that the plaintiffs had proved a *prima facie* case under the holding of this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), by proving that

1. The Native-American minority in Thurston County is sufficiently large and geographically compact that it could constitute an effective majority in a single-member district.

2. Native Americans in Thurston County are politically cohesive.

3. Non-Native Americans in Thurston County vote sufficiently as a bloc to usually defeat the protected group's preferred candidate.

(App. 32-38.)

The district court went on to analyze the case under the totality of the circumstances test. The district court characterized the case as a "close call." (App. 42.) The sum total of the district court's totality-of-the-circumstances test analysis regarding Thurston County was as follows:

> Having determined that the three *Gingles* preconditions are met, the Court must now examine the totality of the circumstances. In this regard, plaintiffs offered substantial evidence concerning the social, economic and educational condition of Native Americans in Thurston County. From this evidence, it is obvious that Native Americans lag behind whites in areas such as housing, poverty and employment. Plaintiffs also offered evidence regarding overt and subtle racial discrimination in the community. However, Dr. Weber [the defendants' expert] testified that while these conditions

> exist, they do not appear to preclude Native Americans from participating in the political process since they are registered to vote in numbers comparable to whites. In addition, defendants offered evidence that Native Americans have enjoyed some success in elections and employment. For example, Marion Tyndall, a Native American, was hired as Chief of Police of the Village of Walthill [a community in Thurston County] and is held in high esteem by the residents of that community. Finally, defendants offered testimony that Native Americans are active, well-received and productive members of the community. In short, both parties offered ample evidence directly relating to the several factors identified in the Senate Report.

(App. 39-40.)

The district court resolved this "close call" under the totality of the circumstances test based on its conclusion that rough proportionality did not exist and wrote that:

> As stated above, Native Americans currently constitute 43.92% of the total population and 35.9% of the VAP of Thurston County. Under the existing County Board districting plan, Native Americans are a majority in two districts, or 28.57% of the seven seats. The disparity, therefore, between representation on the County Board and the total Native-American population is -15.35% and -7.33% based on VAP. Under plaintiffs' proposed plan, Native Americans would constitute a majority in three districts, or 42.86% of the seven seats. Native-American representation would be within -1.06% of the total population and +6.96% based on VAP.
>
> . . . Because the County Board is only a seven-member body, there will be a greater disparity

> between Native-American representation and actual population than in *Johnson* and *Villa*[1] where the challenged plans provided the minority group with representation in almost virtual proportion to VAP. This fact makes the decision in the present case a 'close call.' Nevertheless, the Court in *Johnson* stated that the standard is 'roughly proportional.' Plaintiffs' proposed plan provides Native Americans with representation on the County Board which is closer in proportion to their total and voting-age populations than does the current plan. . . .

(App. 41-42.)

Based on its determination concerning the non-existence proportionality, the district court concluded that the plaintiffs had adduced sufficient evidence to prove a violation of § 2 of the Voting Rights Act under the totality of the circumstances test. (App. 41-42.)

The district court made no findings regarding the plaintiffs' claim that the County had engaged in intentional discrimination and thereby violated the plaintiffs' constitutional rights. Accordingly, that claim was rejected by the district court.[2]

---

[1] The reference is to *African-American Voter Rights Legal Defense Fund v. Villa*, 54 F.3d 1345 (8th Cir. 1995), *reh'g denied*, 999 F.2d 1301, *cert. denied*, ___ U.S. ___, 116 S.Ct. 913 (1996).

[2] It is very well established that all claims that are not disposed of in a judgment are considered to have been rejected by the trial court. *See, e.g., Spangle v. Ming Tah Elec. Co.*, 866 F.2d 102 (8th Cir. 1989); *Schmueser v. Burk Burnett Bank*, 937 F.2d 1025, 1030 (5th Cir. 1991) ("All claims that are not disposed of in a judgment are considered to have been rejected by the trial court"); *Johnson v. McDole*, 394 F. Supp. 1197 (W.D. La. 1975),

COURSE OF PROCEEDINGS ON APPEAL

On appeal, the County did not dispute that there was evidence in the record which supported the district court's conclusion that the plaintiffs had satisfied their burden of proof on the three *Gingles* factors. The County maintained, however, that the district court had erred in concluding that the plaintiffs had proved a violation of § 2 of the Voting Rights Act under the totality of the circumstances test, particularly in light of the fact that Native Americans already formed effective voting majorities in a number of districts roughly proportional to their share in the voting-age population. The County also maintained that, even if rough proportionality did not exist, the plaintiffs had still failed to meet their burden of proof under the totality of circumstances test. (App. 3.)

The Eighth Circuit held that the existence of "rough proportionality" was properly judged on the basis of total population. (App. 12.) The Eighth Circuit also held that, under the holding of this Court in *Johnson v. DeGrandy*, substantial proportionality cannot exist if the minority is "under represented" by more than 2%; that is if the difference between the minority's share in the voting-age population and the number of districts effectively controlled by Native Americans is more than 2%. (App. 12-13.)

---

appeal dismissed, 526 F.2d 710, 711 (5th Cir. 1976) (the general rule is that all claims that are not disposed of in a judgment are considered to have been rejected).

ARGUMENT

1. AN IMPORTANT FEDERAL QUESTION EXISTS, UNRESOLVED BY THIS COURT, CONCERNING THE PROPER METHOD FOR DETERMINING THE EXISTENCE OF ROUGH PROPORTIONALITY.

In *Johnson v. DeGrandy*, this Court held that, ordinarily no violation of § 2 of the Voting Rights Act can be found where "in spite of continuing discrimination and racial-bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. . . . " *Id.* at 1000. In *Johnson*, the defendants were entitled to prevail notwithstanding the fact that the plaintiffs had made an extremely strong showing under the totality of circumstances test. In *Johnson*, the district court found, as a matter of fact, that

(1) whites engaged in racial-bloc voting;

(2) the minority groups were politically cohesive;

(3) the county in question had a system of "tripartite politics" in which "ethnic factors predominated over all others";

(4) non-Hispanic whites voted as a bloc to bar minority candidates from electing their chosen candidates except in those districts where the minority made up a voting majority;

(5) additional minority districts could have been created [i.e., there was a failure to maximize minority voting strength];

(6) minorities bore the social, economic and political effects of past discrimination;

(7) discrimination continued to the present day; and

(8) politics in the county were characterized by "racial cleavages."

Id. at 1003-04.

It is true that, in *Johnson*, this Court said that the existence or nonexistence of rough proportionality is not in and of itself dispositive of a vote-dilution claim under § 2 of the Voting Rights Act, stating that "[w]hile such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances." *Id.* at 1000. The Court suggested that a plaintiff might be able to prevail notwithstanding the existence of proportionality if he or she could demonstrate that the state or political subdivision is currently engaging in practices which the Court suggested to be particularly "reprehensible." Specifically the Court said that:

> In a substantial number of voting jurisdictions, that past reality has included such reprehensible practices as ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, and the white primary; and other practices censurable when the object of their use is discriminatory such as at-large elections, runoff requirements, anti-single-shot devices, gerrymandering, the impeachment of officeholders, the annexation or deannexation of territory, and the creation or elimination of elective offices. Some of those expedients could occur even in a jurisdiction with numerically

> demonstrable proportionality; the harbor safe for States would thus not be safe for voters. It is, in short, for good reason that we have been, and remain, chary of entertaining a simplification of the sort the State now urges upon us. . . .

Id. at 1018-19.

No finding was made by either the district court or the Eighth Circuit Court of Appeals that the County had engaged in any of the "reprehensible practices" referred to in *Johnson*. Thus, the outcome of the present case turned on the determination made by the district court and the Eighth Circuit that rough proportionality did not exist.

(a) The Existence of Proportionality Should be Determined on the Basis of Voting-Age Population.

In some cases, there will be no significant difference between a minority's share in the voting-age population and its share in the total population. That apparently was the case in *Johnson* where this Court stated that a determination concerning the appropriate population base to be used in determining proportionality was "not dispositive." *Id.* at 1017 n. 14.

In the present case, however, there is a significant difference between the Native-American minority's share in the voting-age population and their share in the total population. Native Americans constitute 43.92% of the total population and only 35.9% of the voting-age population. Native Americans unquestionably form effective voting majorities in rough proportion to their share in the

population when that determination is made on the basis of voting-age population. Rough proportionality arguably does not exist if the determination is made on the basis of the minority's share in the total population.

The determination concerning the existence of proportionality should be made on the basis of voting-age population. It appears that virtually every court which has considered the issue has reached that conclusion. In *African-American Voter Rights Legal Defense Fund v. Villa*, *supra* at 1352, the Eighth Circuit Court of Appeals, discussing the decision of the U.S. Supreme Court in *Johnson*, wrote that:

> *Johnson* consistently defines the relevant population as the voting age population . . . Although footnote 11 of *Johnson* refuses to resolve the issue of what is the relevant population in a vote dilution claim, the repeated references to voting age population, coupled with the ultimate holding of *Johnson*, at least permit, even if they do not require, use of the voting age population as a relevant population. *Johnson* clearly stands for the proposition that voting age population is a relevant population for proportionality purposes despite *Johnson's* refusal to hold that it is the only relevant population. Subsequent cases have unanimously interpreted *Johnson* as approving the use of voting age population as a relevant population. *See, e.g., NAACP v. Austin*, 857 F.Supp. 560, 569 (E.D. Mich. 1994) ("In assessing proportionality we use voting-age population figures, as the Supreme Court did in *DeGrandy*."); *see also, Shaw v. Hunt*, 861 F.Supp. 408, 440 n. 28 (E.D. N.C. 1994), [*reversed on other grounds*, 517 U.S. 899 (1996)]. *Vera v. Richards*, 861 F.Supp. 1304, 1339 n. 49 (S.D. Tex. 1994)

> [*aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996)]. Accordingly, we hold that the district court's use of voting-age population was consistent with *Johnson* and was not error.[3]

The existence of proportionality should be determined on the basis of the voting-age population. That interpretation is consistent with the language of § 2 of the Voting Rights Act which states that a violation of the Act may be proved where members of the minority "have less opportunity *than other members of the electorate* to participate in the political process and to elect representatives of their choice." *Id.* (emphasis added). If a minority constitutes 40% of the voting-age population in a particular political subdivision, constitutes an effective majority in 40% of the election districts, and regularly elects the representatives of its choice in 40% of the election districts, then it is very clear that members of the minority have the same opportunity as *"other members of the electorate* to participate in the political process and to elect representatives of their choice." *Id.* (emphasis added).

---

[3] *Villa* was decided on a motion for summary judgment. In that case, evidence indicating that proportionality did not exist based on voting-age population was judged not to be sufficient to create a genuine issue of fact. It is interesting to note that the same type of evidence not only created a genuine issue of fact, but was dispositive in the present case.

Nevertheless, according to both the district court and the Eighth Circuit Court of Appeals in this case, proportionality would not exist in the hypothetical above if the minority constituted 60% of the total population because, in the words of the Eighth Circuit, increasing the number of majority-minority districts would "create closer proportionality." (App. 12.). Indeed, under the approach used by the Eighth Circuit, the requirement of creating "closer proportionality" would be satisfied only when the minority constituted effective voting majorities in 60% of the election districts.

Neither the district court nor the Eighth Circuit endeavored to explain the logical basis for measuring the political power of minority voters by focusing on a pool of persons who are not eligible to vote. Certainly, there is no evidence in this case that there is any political cohesiveness between members of the minority who are of voting age and those who are not of voting age. There is no evidence in this case that the members of the county board who are from majority-minority districts do any better job of representing the interests of Native-American children than do the members of the board who are from majority-majority districts.[4]

The Eighth Circuit's use of total population to determine the existence of proportionality is (1) contrary to the decisions of other federal courts, (2) contrary to the clear language of § 2 of the Voting Rights Act, and (3) illogical

---

[4] The representative elected from a majority-Native American supervisor district in Thurston County is just as likely to be white as Native American. Indeed, a Native American has never been elected to the board from supervisor district 4.

in that the use of total population does not produce an accurate assessment of minority voting strength vis-a-vis white voters.

Beyond that, however, the lack of a clear standard on this issue will create needless uncertainty and confusion for states and political subdivisions as they attempt to redistrict in a lawful manner after the 2000 census. The County recognizes that in *Johnson* this Court specifically refused to make proportionality a "safe harbor." *Id.* at 1018-20. Nevertheless, just as the existence of proportionality determined the outcome in *Johnson*, the existence or non-existence of proportionality is sure to determine the outcome under the totality of the circumstances test in many cases.

Most states and political subdivisions would very much like to avoid litigation in this area if at all possible. Indeed, litigation of this type is not a good thing for the democratic process, particularly when that litigation results in the invalidation of elections, or the issuance of injunctions preventing scheduled elections from occurring. Much litigation can be avoided if the Court establishes clearly that rough proportionality will be assessed on the basis of voting-age population, rather than on the basis of total population. That does not mean that proportionality would be a "safe harbor" for states and political subdivisions. It would mean, however, that states and political subdivisions would have a more realistic opportunity to assess their legal obligations and responsibilities under the Voting Rights Act.

(b) The Eighth Circuit Court of Appeals Erred in Holding that Rough Proportionality Cannot Exist Where the Difference Between the Percentage of Minority Voters in the Voting-Age Population and the Percentage of Districts in Which the Minority Constitutes an Effective Voting Majority is More than 2%.

The Eighth Circuit Court of Appeals also concluded that, even if the existence of "rough proportionality" was judged on the basis of voting-age population, rough proportionality cannot exist where the difference between the percentage of minority voters in the voting-age population, and the percentage of districts in which the minority constitutes an effective voting majority, is more than 2%. (App. 12-13.) The Eighth Circuit based its decision in that regard on the decision of this Court in *Johnson*. The Eighth Circuit's reading of *Johnson* in that regard is highly inaccurate and would effectively limit the application of the principle of proportionality to units of government having large numbers of elected representatives.

In *Johnson*, this Court, analyzing the extent to which proportionality existed, wrote that:

> Within this seven-district Dade County area, both minority groups enjoy rough proportionality. The voting-age population in the seven-district area is 44.8% Hispanic and 15.8% black . . . Hispanics predominate in 42.9% of the districts (3 out of the 7), as do blacks in 14.3% of them (1 out of 7). While these numbers indicate *something just short of perfect proportionality* (42.9% against 44.8; 14.3% against 15.8), the opposite is true of the 5 districts located wholly within Dade County.

Id. at 1023 (emphasis added). The Court in *Johnson* did not say that the approximately 2% differential specifically approved in that case constituted a ceiling on the concept of "rough proportionality." In fact, far from being a limitation, the 2% deviation was *"something just short of perfect proportionality."* *Id.* (emphasis added).

Further, the *Johnson* opinion clearly indicates that the Court was not troubled at all by a deviation in the 7% range. In that regard, the Court stated that:

> In the five districts wholly within Dade County, where Hispanics are concentrated, the voting-age population is 53.9 percent Hispanic and 13.5 percent black. Sixty percent of the districts are Hispanic-majority (three out of five), and 20 percent are black-majority (one out of five), so that each minority group protected by § 2 enjoys an effective voting majority in *marginally* more districts than proportionality would indicate (60 percent over 53.9; 20 percent over 13.5).

Id. at 1023 n. 19 (emphasis added). "Marginal" means "of minor importance, small, having little effect." THE OXFORD ENGLISH DICTIONARY (2d ed. 1989). Thus, it is clear that, in the context of assessing proportionality, this Court considered a deviation of 6.5% to be "of minor importance." Nothing in the opinion suggests that such a deviation approaches the outer limit of what might be considered "rough" proportionality. The term "roughly" means "in a crude fashion," and "without completeness or exactness." WEBSTER'S NEW COLLEGIATE DICTIONARY (1981).

In this case, Native Americans constitute 35.9% of the voting-age population. They constitute the majority in 28.6% of the supervisor districts (2 of 7). If a third majority-minority district is created, Native Americans will be a majority in 42.9% of the supervisor districts. In that case, non-Native Americans with 64.1% of the voting-age population would be the majority in only 57.1% of the supervisor districts. It is clear that, in either case, either Native Americans or non-Native Americans will be "over-represented" or "under-represented" by some fractional portion of a supervisor seat.

It is evident that, in adopting the phrase "roughly proportional," this Court was saying that the federal court should not be involved in the kind of hair-splitting micro management of the election process sought by the plaintiffs in this case. This Court should adopt the standard used by the district court in *Rural West Tennessee African-Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1107 n. 12 (W.D. Tenn.), *aff'd sub nom. Rural West Tennessee African-Am. Affairs Council, Inc. v. Sundquist*, ___ U.S. ___, 116 S. Ct. 42 (1995) (mem.) In that case, the Court held that

> The *DeGrandy* Court also employed the phrase 'substantial proportionality' . . . Substantial proportionality exists when a legislature has created the maximum number of majority-minority districts possible without exceeding proportionality. For example, in the current case, the reapportionment plan would have to include four majority-minority districts (12.1% of the total districts) for substantial proportionality to exist because blacks are 14.4% of the total voting-age population of Tennessee. Four is the

> greatest number of districts that can be created without exceeding the 14.4% figure.

Id.

The district court in the present case recognized that "[b]ecause the County Board is only a seven-member body, there will be a greater disparity between Native-American representation and actual population" than where larger electoral bodies are involved. (App. 42.) Indeed, the methodology used by the Eighth Circuit in this case will make the concept of "proportionality" one that is essentially meaningless where relatively small electoral bodies are involved. Also, the opinion of the Eighth Circuit with regard to this issue is likely to generate considerable confusion and thus spawn litigation which might otherwise be avoided.

(c) The Eighth Circuit Decision Effectively Mandates Proportional Representation Because the Eighth Circuit Found "Intentional Discrimination" Based Solely on the County's Failure to Provide Native Americans with Representation in Numbers Equal to Their Proportion in the Population.

In *Johnson*, this Court explained the difference between the concepts of "proportional representation" and "proportionality" in the following manner:

> 'Proportionality' as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that 'nothing in this section

> establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.' 42 U.S.C. § 1973(b). This *proviso* speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters . . . And the *proviso* also confirms what is otherwise clear from the text of the statute, namely that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority preferred candidates of whatever race.

Johnson v. DeGrandy at 1014.

The Eighth Circuit Court of Appeals in this case found "intentional discrimination" on the part of the County *solely* on the basis of the County's failure to provide Native Americans with proportional representation. In that regard, the Court wrote that:

> Moreover, the evidence indicates that Thurston County intentionally discriminated against Native Americans because it failed to make adjustments during the 1990 redistricting process in response to the information gathered in the 1990 census demonstrating a shift in the population's racial composition due to the increased Native American population. This evidence shows that Thurston County maintained its current districting system with a discriminatory intent and thwarted Congress's purpose in amending § 2 in 1982 to provide "equally open" political processes . . .

(App. 3.) (citation omitted). The egregious act on the part of the County which led to this finding was the County's failure to provide Native Americans, who constitute 35.9% of the VAP, with 42.86% of the seats on the County

Board of Supervisors.[5] This is a powerful inducement indeed for any political subdivision to create proportional representation for the minority because the failure to do so will, in the Eighth Circuit, lead to a finding of intentional discrimination.[6] That in turn would, in most cases, be sufficient to prove a constitutional violation[7] which would result in the state or political subdivision being subjected to preclearance requirements.[8] It is hard to imagine that a court could lay down a clearer mandate to states and political subdivisions to create proportional representation for minority groups.

---

[5] The redistricting plan in this case was created by Mark Casey at his home in Thurston County. Mr. Casey is a farmer, who has no training in redistricting, and who is an unpaid member of the County Board. Mr. Casey undertook the redistricting after other members of the Board, including those representing majority-minority districts, declined the opportunity to participate. The redistricting was unanimously approved by the County Board as part of an open public process. No one, including the plaintiffs in this case, raised any objection to the redistricting plan before it was adapted.

[6] It is worth noting again that the district court resolved the plaintiffs' constitutional claim in favor of the County, and that the plaintiffs did not appeal that determination.

[7] *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

[8] In that regard, 42 U.S.C. § 1973a(c) provides that the court "shall" order preclearance if the court finds a violation of the Fourteenth or Fifteenth Amendments "[i]n any proceeding instituted by the Attorney General or any aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendments. . . . " *Id.*

Even if the Eighth Circuit mandated only that the County provide for "proportionality" rather than "proportional representation," the decision is still clearly at odds with the holding in *Johnson*, wherein this Court wrote that

> . . . we reject the safe harbor rule because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity. Because in its simplest form the State's rule would shield from § 2 challenge a districting scheme in which the number of majority-minority districts reflected the minority's share of the relevant population, the conclusiveness of the rule might be an irresistible inducement to create such districts. It bears recalling, however, that, for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculous aptly described as the 'politics of second best,' see B. Grofman, L. Handley, & R. Niemi, Minority Representation and the Quest for Voting Equality, 136 (1992).

Id. at 1020.

Similarly, given the Eighth Circuit's determination that a finding of intentional discrimination can be predicated on nothing more than a political subdivision's failure to create proportional representation (or proportionality as the case may be), there certainly would be "a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where

they may not be necessary to achieve political and electoral opportunity." *Id.*

CONCLUSION

The Court should grant the petition for a writ of certiorari. The rulings of the Eighth Circuit Court of Appeals in this case are at odds with the holding of this Court in *Johnson* and with the holdings of most other lower courts. The 2000 census will give rise to redistricting throughout the country, which in turn will almost certainly give rise to the filing of many new lawsuits. The Court's consideration of the several important issues raised in this case would help to provide clarification in an area where the law is anything but clear. That in turn might well serve to reduce future litigation which is injurious to the public perception of the election process.

Respectfully submitted,

County of Thurston, Nebraska, and Mark Casey, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska, Petitioners

HARDING, SHULTZ & DOWNS AND
GREGORY D. BARTON – 18759
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel of Record for Petitioners

Hollis D. STABLER, Jr.; Sharon Freemont; Omaha Tribal Historical Project, Inc.; Red Feather Family Services, Inc., Plaintiffs-Appellees,

v.

COUNTY OF THURSTON, NEBRASKA; Mark Casey, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska, Defendants-Appellants.

Thurston County School District 13, Thurston County, Nebraska; Village of Walthill, Nebraska; Steve Dunn, in his official capacity as Chair of the Village of Walthill Board of Trustees; Patricia Higgins, in her official capacity as County Clerk of Thurston County, Nebraska; Keith Mahaney, in his official capacity as President of Thurston County School District 13, Defendants.

Hollis D. STABLER, Jr.; Sharon Freemont; Omaha Tribal Historical Project, Inc.; Red Feather Family Services, Inc., Plaintiffs-Appellants,

v.

COUNTY OF THURSTON, NEBRASKA; Mark Casey, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska; Thurston County School District 13, Thurston County, Nebraska; Village of Walthill, Nebraska; Steve Dunn, in his official capacity as Chair of the Village of Walthill Board of Trustees; Patricia Higgins, in her official capacity as County

Clerk of Thurston County, Nebraska; Keith Mahaney, in his official capacity as President of Thurston County School District 13, Defendant-Appellees.

Nos. 96-2964, 96-3111.

United States Court of Appeals, Eighth Circuit.

Submitted May 19, 1997.

Decided Dec. 1, 1997.

Neal E. Stenberg, Lincoln, NE, argued, for appellant.

Neal Bradley, Atlanta, GA, argued (Lauglin McDonald, Maha Zaki, Christina Correia, Mary Wyckoff, on the brief), for appellee.

Before McMILLIAN, ROSS and FAGG, Circuit Judges.

McMILLIAN, Circuit Judge.

Defendant County of Thurston, Nebraska (Thurston County), appeals from a final order entered in the United States District Court[1] for the District of Nebraska holding that the districting plan for the election of the Thurston County Board of Supervisors (the County Board) violates section 2 of the Voting Rights Act of 1965(§ 2), as amended, 42 U.S.C. § 1973, and ordering Thurston County to create a third majority-minority district for such elections. *Stabler v. County of Thurston*, No. 8:CV93-00394 (D.Neb. Aug. 29, 1995). For reversal,

---

[1] The Honorable Lyle E. Strom, Senior United States District Judge for the District of Nebraska.

Thurston County argues that the district court erred in: (1) considering total population and voting age population to determine proportionality; (2) applying the totality of the circumstances test; and (3) finding that the districting plan violated § 2. Plaintiffs Hollis D. Stabler, Jr., Sharon Freemont, Omaha Tribal Historical Project, Inc., and Red Feather Family Services (collectively, "plaintiffs") cross-appeal from that part of the order entered in favor of defendants Thurston County School District 13 (School District 13) and Village of Walthill (the Village) holding that the districting plan used to elect both the District's school board (the School Board) and the Village's Board of Trustees (the Village Board) does not violate § 2 or the First, Thirteenth, Fourteenth, or Fifteenth Amendments to the United States Constitution. *Id.* On cross-appeal, plaintiffs argue that the district court erred in holding that plaintiffs failed to satisfy the three *Gingles*[2] preconditions for a § 2 claim. For the reasons discussed below, we affirm the order of the district court.

Jurisdiction was proper in the district court based upon 28 U.S.C. §§ 1331, 1343(a)(4), and 2201. Jurisdiction on appeal is proper based upon 28 U.S.C. § 1291. The notices of appeal and cross-appeal were timely filed under Fed.R.Civ.P. 4(a).

I. Background

The following facts are taken from the district court's memorandum opinion. Slip op. at 1-2, 6-8, 19-20. The

---

[2] *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

Omaha and Winnebago Indian Reservations are located in eastern Thurston County, which lies in northeast Nebraska. Accordingly, Thurston County has a substantial Native American population concentrated in the eastern half of the county. The Village is a small community located in eastern Thurston County. School District 13, which serves the Village and the surrounding area, has a student body population which, during the 1994-1995 school year, was 80% Native American.[3] The individual plaintiffs, Hollis Stabler, Jr., and Sharon Freemont, are Native American citizens and voters in Thurston County, School District 13, and the Village. The organizational plaintiffs, Omaha Tribal Historical Project, Inc., and Red Feather Family Services, are located in Thurston County.

In 1979, the County Board entered into a consent decree which created its current method of election. The County Board is composed of seven members elected from single-member districts, with each member holding a four-year term. Members are nominated in partisan primary elections and elected in general elections in even numbered years. Four members (Districts 1, 3, 5, and 7) are elected in gubernatorial election years, while three members (Districts 2, 4, and 6) are elected in presidential election years. The County Board drew the district lines to create two Native American majority districts, providing Native Americans in Thurston County with representation on the County Board in proportion to their 28.5% share of the total population in 1979. (Two of seven County Board seats = 28.57%.) Following the 1980 census,

---

[3] Brief for Appellees/Cross-Appellants at 19, *citing* plaintiffs' exhibit no. 19.

the County Board redistricted and again created two Native American majority districts. At that time, non-whites made up 33.8% of Thurston County's total population.[4] According to the 1990 census, of Thurston County's total population, 43.92% are Native Americans and 55.67% are whites. Of Thurston County's voting age population (VAP), 35.9% are Native Americans and 63.54% are whites.

Following the 1990 census, the County Board created the districting scheme challenged by plaintiffs. In Districts 4 and 6, which are the majority-minority districts, Native Americans constitute a majority of the total population (87.9% and 96.9%, respectively) and the VAP (82.8% and 94.5%, respectively). Whites constitute a majority of the total population and the VAP in the other five districts. However, in Districts 2, 3, and 5, Native Americans represent a substantial portion of the total population (41.2%, 30.9%, and 46.3%, respectively) and the VAP (36.9%, 22.7%, and 36.4%, respectively). Only Districts 1 and 7 contain nominal Native American populations.

The School Board is composed of six members, each elected at-large to a four-year term. Three members are elected every two years in a non-partisan primary election in May and a non-partisan general election in November. The winners in each primary election are the top six finishers determined by a plurality vote method,

---

[4] The district court found that, statistically, the terms "non-white" and "Native American" are "virtually synonymous." *Stabler v. County of Thurston*, No. 8:CV93-00394, slip op. at 7 n. 3 (D.Neb. Aug. 29, 1995).

and the winners of the general election are the top three finishers by plurality vote.

The Village Board is composed of five members, each elected at-large to a four-year term. Three members are elected in a non-partisan general election held in May of the gubernatorial election year, and two members are elected in a general election held in May of the presidential election year. The winners in each general election are the top three (or two) finishers determined by a plurality vote method.

Plaintiffs filed suit against Thurston County, School District 13, and the Village, alleging that the districting plan used to elect the County Board and the at-large method used to elect the School Board and the Village Board violate § 2 of the Voting Rights Act of 1965 and the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution by diluting the voting strength of Native Americans in Thurston County and in the Village. Plaintiffs alleged that the current districting system used to elect the County Board packs most of Thurston County's Native American population into Districts 4 and 6 and fragments the remaining Native American population among Districts 2, 3, and 5. Because the Native American population in Thurston County has increased, as a percentage, from 28.5% in 1979 to 43.92% in 1990, plaintiffs sought the creation of a third Native American majority district for the election of the County Board. Plaintiffs also sought to implement single-member or multi-member districting plans for the election of the School Board and the Village Board. Regarding the School Board, plaintiffs offered two alternative districting plans: one plan features two three-member districts; the other

plan features six single-member districts. Regarding the Village Board, plaintiffs offered a plan featuring two single-member districts and one three-member district.

The district court conducted a bench trial on the issues from May 30, 1995, until June 2, 1995. With respect to the County Board, the district court found that it is possible to create another majority-minority district because: the minority group (Native Americans) is sufficiently large and geographically compact; the minority group is politically cohesive; and the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. Slip op. at 13-15. The district court then examined the totality of the circumstances, determined that the County Board's districting plan does not provide Native American voters representation on the County Board which is "roughly proportional" to their total and voting age populations, and concluded that the challenged plan violates § 2 by diluting the voting strength of Native American voters. *Id.* at 18. The district court ordered the County Board to submit a districting plan to create a third Native American majority single-member district. *Id.* The County Board timely submitted a plan and subsequently submitted an amended plan to correct some mathematical errors. The amended remedial plan was approved by the district court on June 26, 1996, and is scheduled to be phased into place beginning with the 1998 elections.

With respect to the School Board and the Village Board, the district court held that, while the parties were able to draw a single-member district in which Native Americans constitute a majority, the boundaries of those districts would be highly irregular and the result would

be racially gerrymandered districts. The district court held that such irregularly-drawn districts would run afoul of the equal protection clause because they were drawn principally for racial considerations. *Id.* at 20, *citing Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (*Miller*), and *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). The district court further held that the challenged jurisdictions are so small that no feasible single-member or multi-member districting plan can be drawn because it would be inflexible to any change in the district's racial composition. Therefore, the district court found that the protected group, Native Americans, is not sufficiently large and geographically compact to justify a majority-minority district for the School Board or the Village Board elections. *Id.* The district court also held that plaintiffs did not prove a constitutional violation because they could not show that there was a racially discriminatory purpose and effect in establishing the at-large election systems for the School Board and the Village Board. *Id.* at 21-22. Thurston County's appeal and plaintiffs' cross-appeal followed.

II. Discussion

In a § 2 case, we review the district court's findings "regarding the factual context giving rise to the claim" for clear error. *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1386 (8th Cir.1995) (en banc) (*Harvell*), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1876, 135 L.Ed.2d 172 (1996). However, the district court's legal conclusions, " 'including those that may infect so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law,' are subject to

plenary review." *Id., quoting Thornburg v. Gingles,* 478 U.S. 30, 78-79, 106 S.Ct. 2752, 2780-81, 92 L.Ed.2d 25 (1986) (*Gingles*).

A voting procedure violates § 2 if it has the "result" under the "totality of the circumstances" of affording minority voters less opportunity than white voters "to elect representatives of their choice." 42 U.S.C. § 1973(b). A successful § 2 claimant must show three necessary preconditions: (1) the minority group is sufficiently large and geographically compact to constitute an effective majority in a single-member district; (2) the minority group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Gingles,* 478 U.S. at 50-51, 106 S.Ct. at 2765-66. These three preconditions apply to challenges to single-member districts as well as multi-member districts. *Growe v. Emison,* 507 U.S. 25, 40-41, 113 S.Ct. 1075, 1084-85, 122 L.Ed.2d 388 (1993). "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy,* 512 U.S. 997, 1008, 114 S.Ct. 2647, 2655, 129 L.Ed.2d 775 (1994) (*Johnson*). Once the preconditions are met, § 2 plaintiffs must further show that, under the totality of the circumstances, vote dilution has occurred because the challenged plan denies minority voters equal political opportunity. *Id.* at 1011-12, 114 S.Ct. at 2656-57; *Gingles,* 478 U.S. at 43, 106 S.Ct. at 2762. The factors to be considered include: (1) a history of official discrimination in the political subdivision that touched

the right of minority group members to register, vote, or otherwise participate in the democratic process; (2) the extent to which voting in the elections of the political subdivision is racially polarized; (3) the political subdivision's use of unusually large election districts, majority-vote requirements, anti-single shot provisions (discouraging voters from using only one of their multiple votes), or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) whether the minority group members have been denied access to a candidate-slating process, where one exists; (5) the extent to which minority group members in the political subdivision bear the effects of discrimination in such areas as education, employment, and health which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; and (7) the extent to which minority group members have been elected to public office in the jurisdiction. *See Gingles*, 478 U.S. at 36-37, 106 S.Ct. at 2758-59. Additional factors that may be probative of vote dilution are: (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group and (9) whether the policy underlying the political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous. *See id.* at 37, 106 S.Ct. at 2759.

A. *Thurston County's Appeal*

1. *Proportionality*

Thurston County argues that the district court erred in basing its proportionality determination on both total population and VAP figures because only VAP should be considered. Thurston County contends that, in *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1352 (8th Cir.1995) (*Villa*) (citing *Johnson*, 512 U.S. at 1013-14 & n. 11, 114 S.Ct. at 2657-58 & n. 11), *cert. denied*, ___ U.S. ___, 116 S.Ct. 913, 133 L.Ed2d 844 (1996), this court recognized that "*Johnson* consistently defines the relevant population as the voting age population." It claims that the Supreme Court left open the question whether another population base could be used (e.g., total population). Thurston County maintains that, because the district court relied on the VAP, it erred in also considering the total population.

Thurston County also argues that the district court erred in holding that the County Board is required to provide "proportional representation" to minority voters. Rather, Thurston County contends that substantial proportionality is sufficient because 42 U.S.C. § 1973(b) provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Thurston County suggests that the district court confused the concepts of "proportional representation" and "proportionality" and erroneously focused its determination on proportional representation, which refers to the success of minority group member candidates, rather than on "proportionality," which "links the number of majority-

minority voting districts to minority members' share of the relevant population." *See Johnson*, 512 U.S. at 1014 n. 11, 114 S.Ct. at 2658 n. 11. Thurston County maintains that the number of majority-minority voting districts provided by its districting plan (2 of 7 districts, or 28.5%) is substantially proportional to Native Americans' 35.9% share of the VAP.

We disagree and hold that the district court did not err in finding that the challenged districting plan lacks proportionality. *See* slip op. at 17-18. "While [rough] proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed." *Johnson*, 512 U.S. at 1000, 114 S.Ct. at 2651. The creation of a third majority-minority district would increase the share of majority-minority districts to 42.86% of all districts and would create closer proportionality than the current two majority-minority districts plan (28.57%), whether total population (43.92%) or VAP (35.9%) is considered. Under the current plan, Native Americans are under-represented by more than 7% considering VAP and 15% considering total population. Under the district court's plan, Native Americans would be over-represented by less than 7% considering VAP and under-represented by less than 1.5% considering total population. Whether we consider the total population or the VAP, the proposed three majority-minority districts plan results in less disparity than the current plan and more closely approximates rough, or substantial, proportionality, as discussed in *Johnson*, 512 U.S. at 1023, 114 S.Ct. at 2662 in which the Supreme Court

upheld a districting plan with approximately a 2% population disparity, and in *Villa*, 54 F.3d at 1353, in which this court approved a districting plan with less than a 1% disparity.

Furthermore, Thurston County mischaracterizes "substantial proportionality" as "the maximum number of majority-minority districts possible without exceeding proportionality." Brief for Appellants/Cross-Appellees at 20 n. 1, *citing Rural West Tennessee African-Am. Affairs Council, Inc. v. McWherter*, 877 F.Supp. 1096, 1107 n. 12 (W.D.Tenn.), *aff'd sub nom. Rural West Tennessee African-Am. Affairs Council, Inc. v. Sundquist*, ___ U.S. ___, 116 S.Ct. 42, 133 L.Ed.2d 9 (1995) (mem.). Only in a rare case will the population ratios match the fractions of the number of districts such that one group is not over-represented. There is no reason why the Native American minority in this case should continue to bear the burden of under-representation under the current scheme while the white majority enjoys over-representation. The creation of a third majority-minority district will not harm non-Native Americans because the evidence does not show that Native Americans vote as a bloc to defeat white voters' candidates of choice. Moreover, the evidence indicates that Thurston County intentionally discriminated against Native Americans because it failed to make adjustments during the 1990 redistricting process in response to the information gathered in the 1990 census demonstrating a shift in the population's racial composition due to the increased Native American population. This evidence shows that Thurston County maintained its current districting system with a discriminatory intent and thwarted Congress's purpose in amending § 2 in 1982

to provide "equally open" political processes. *See Johnson*, 512 U.S. at 1018-19, 114 S.Ct. at 2660-61.

2. *Totality of the Circumstances*

While conceding that plaintiffs satisfied the three *Gingles* preconditions, Thurston County argues that the district court erred in finding that plaintiffs satisfied the totality of the circumstances test. Thurston County claims that there is no evidence of past discrimination affecting Native Americans' voting strength. It asserts that, in fact, it has taken measures to make it easier for Native Americans to participate in the voting process by sending the county clerks to various communities to register voters. Thurston County also claims that, while some evidence was offered to show racially polarized voting, the evidence also showed that Native Americans and whites in Thurston County have sometimes shared a preferred candidate. Thurston County also claims that: none of its voting practices or procedures enhance the opportunity for discrimination against Native Americans because unusually large election districts are not used; members of the County Board are elected by plurality, rather than majority, vote; anti-single shot provisions were not used; and County Board elections do not involve a candidate-slating process but, rather, use an open primary system. Thurston County also argues that plaintiffs failed to show any causal link between the lingering effects of discrimination and Native Americans' ability to participate in the political process. Specifically, Thurston County contends that plaintiffs failed to show any lingering economic disparities resulting from discrimination in education,

employment, and health. Thurston County asserts that plaintiffs cannot show economic disparity because recent developments (a casino) have given Native Americans an economic boost. Thurston County also contends that witnesses testified that the political campaigns are not characterized by overt or subtle racial appeals. As for the extent to which Native Americans are elected to the County Board, Thurston County refers to the regular election of Native Americans in District 6 and the realistic potential to elect a Native American in District 4 (because it is a majority-minority district) even though non-Native Americans have historically been elected in that district. Thurston County also contends that the County Board regularly consults and cooperates with the Omaha and Winnebago Tribes and concludes that its decision not to create a third majority-minority district is not tenuous because it has already created majority-minority districts in proportion to Native Americans' share of the VAP.

We disagree and hold that the district court's finding that, under the totality of the circumstances, Native Americans do not have equal access to the political process in Thurston County is not clearly erroneous. *See* slip op. at 18. As stated above, under *Johnson*, 512 U.S. at 1000, 114 S.Ct. at 2651 proportionality is a relevant factor to be considered in the totality of the circumstances analysis. While plaintiffs must still show that, under the totality of the circumstances, the current voting scheme provides them with less opportunity than other voters to participate in the electoral process and elect representatives of their choice, *see* 42 U.S.C. § 1973(b), the "[s]atisfaction of the necessary *Gingles* preconditions carries [ ] plaintiff [s]

a long way towards showing a Section 2 violation." *Harvell*, 71 F.3d at 1390. The two primary factors considered in the totality of the circumstances analysis are: (1) the extent to which voting is racially polarized and (2) the extent to which minorities have been elected under the challenged scheme. *Id., citing Gingles*, 478 U.S. at 48-49 n. 15, 106 S.Ct. at 2764-65 n. 15. The district court did not clearly err in finding "racial polarization" based upon its analysis of various Thurston County elections from 1978 to 1992 which "indicate that Native Americans overwhelmingly vote for Native American candidates and whites vote for white candidates to defeat the Native American candidate of choice." Slip op. at 14. This finding also explains the lack of success achieved by Native American candidates. Despite the evidence presented by Thurston County that Native Americans have enjoyed "some success in elections and employment," the district court's finding that "racial polarization and minimal white crossover voting results in a legally significant white bloc vote to defeat Native American candidates of choice" is not clearly erroneous. *Id.*

Other totality factors, while not essential to support plaintiffs' claim, support the district court's finding of a § 2 violation. *See Harvell*, 71 F.3d at 1390. The district court found that Native Americans bear the effects of social, economic, and educational discrimination and concluded that "it is obvious that Native Americans lag behind whites in areas such as housing, poverty and employment." Slip op. at 15-16. We cannot say that these findings are clearly erroneous. Nor can we say that the district court's finding of overt and subtle racial discrimination in the community is clearly erroneous. *Id.* at 16.

Thurston County, School District 13, and the Village each employ only one Native American, and social organizations in Thurston County are not racially mixed. Consequently, the white majority has little interaction with most Native American candidates, and, therefore, the opportunity to become known as a person and to be trusted with public office is not equal. This disparate socio-economic status is causally connected to Native Americans' depressed level of political participation, despite Thurston County's efforts to register Native Americans to vote.

3. *§ 2 Findings*

Thurston County argues that, even if this court does not reverse the district court's holding regarding proportionality and the totality of the circumstances, the case should be remanded to the district court for detailed findings to enable this court to determine the factual and legal bases for the district court's judgment. Brief for Appellants/Cross-Appellees at 29-30, *citing Buckanaga v. Sisseton Ind. Sch. Dist. No. 54-5*, 804 F.2d 469, 472 (8th Cir.1986) (*Buckanaga*) (requiring district courts to explain with particularity their reasoning and underlying subsidiary factual conclusions in vote dilution claims). Thurston County contends that the district court failed to discuss the substantial evidence contrary to its finding of vote dilution and that its totality of the circumstances analysis was cursory.

We disagree and hold that the district court made adequate factual findings to support its holding and discussed the substantial evidence contrary to its decision as

required under Fed.R.Civ.P. 52(a) and *Buckanaga*, 804 F.2d at 472. The district court thoroughly discussed the facts underlying its conclusion that the *Gingles* preconditions were met in this case and that a violation was shown under the totality of the circumstances. Slip op. at 6-18. Additionally, the district court considered the evidence presented by Thurston County that "Native Americans have enjoyed some success in elections and employment" and testimony that "Native Americans are active, well-received and productive members of the community." *Id.* at 16. Further findings by the district court are not necessary.

B. *Plaintiffs' Cross-Appeal*

Plaintiffs argue that the district court erred in holding that "plaintiffs cannot prove that Native Americans are sufficiently large and geographically compact to constitute a majority in a single-member district which is regularly drawn and non-bizarrely shaped." *Id.* at 20. First, plaintiffs claim that the illustrative districting plans for the School Board and the Village Board cannot be described as bizarre in light of the irregularity of those jurisdictions themselves. Plaintiffs contend that their § 2 claim should not be defeated on the basis of gerrymandered districting because a districting plan adopted or imposed as a remedy for a § 2 violation necessarily uses race as part of its basis. Plaintiffs maintain that, if this court conducts an equal protection review of the proposed districting plans, the plans should survive strict scrutiny because the creation of a majority-minority district is reasonably necessary to comply with § 2 and such

redistricting substantially addresses the § 2 violation without considering race more than is necessary to remedy the § 2 violation. Brief for Appellees/Cross-Appellants at 46, *citing Shaw v. Hunt*, ___ U.S. ___, ___-___, 116 S.Ct. 1894, 1905-07, 135 L.Ed.2d 207 (1996), *and Bush v. Vera*, ___ U.S. ___, ___, ___, 116 S.Ct. 1941, 1960, 1968, 135 L.Ed.2d 248 (1996) (plurality assumed without deciding that a state's interest in avoiding § 2 liability can be a compelling state interest for purposes of strict scrutiny inquiry, while concurring Justice expressed that compliance with § 2 is a compelling state interest). Furthermore, plaintiffs contend that the proposed districting plans cannot be defeated based solely on their fragile racial composition because *Gingles* merely requires that § 2 plaintiffs show that, by creating a majority minority district, the minority possesses the "potential to elect representatives." 478 U.S. at 50 n. 17, 106 S.Ct. at 2767 n. 17.

Plaintiffs also argue that the district court failed to properly consider all of the evidence of racially polarized voting. Plaintiffs claim that the district court erred in limiting the evidence of voter cohesion and bloc voting to statistical evidence and in failing to consider non-statistical evidence of voting behavior. Plaintiffs maintain that the district court did not consider certain lay witness testimony, the consistent defeat of Native American candidates, the lack of Native American candidates, the "eye balling" of election returns (to make generalizations from the results), and a history of discrimination. For example, plaintiffs especially note the testimony that a white man told his Native American neighbor, who was running for School Board election, that he would move if an Indian was elected to the School Board.

We disagree and hold that the district court did not err in holding that the proposed districting plans were not workable remedies to the challenged practices. *See* slip op. at 20. The district court justifiably rejected the proposed plans because of the fragile composition of the proposed districts. *Id.* Under the proposed plans, if 4 or 5 Native Americans moved from the proposed majority-minority districts created for the School Board and Village Board, respectively, and they were replaced by non-Native Americans, the majority-minority composition would be destroyed. Brief for Appellees at 27, 30. Therefore, plaintiffs failed to prove that Native Americans are geographically compact to form an effective voting majority in a single-member district as required under *Gingles*.

In the alternative, we hold that the district court did not err in holding that the proposed districting plans constitute gerrymandering in violation of the equal protection clause of the Fourteenth Amendment. *See* slip op. at 20. A districting plan violates the equal protection clause when it is shown, " 'either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor' motivating the placement of 'a significant number of voters within or without a particular district.' " *Harvell v. Blytheville Sch. Dist. No. 5*, 126 F.3d 1038, 1039 (8th Cir.1997), *quoting Miller*, 515 U.S. at 916, 115 S.Ct. at 2488. Any remedy drawn in order to correct a § 2 violation should "steer clear of the type of racial gerrymandering proscribed in *Miller.*" *Harvell*, 71 F.3d at 1391. Bizarre shape is "persuasive circumstantial

evidence that race for its own sake, and not other districting principles, was [plaintiffs'] dominant and controlling rationale in drawing [the proposed] district lines." *Miller*, 515 U.S. at 913, 115 S.Ct. at 2486. The bizarre shape of the proposed districts, considered in combination with the racial and population densities of the proposed districts, support the district court's finding that race was the predominant factor in drawing the proposed districts to create a majority-minority single-member district and that the proposed redistricting resulted in gerrymandered districts. *See id.* at 917, 115 S.Ct. at 2488. "If race is the predominant motive in creating districts, strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive." *Abrams v. Johnson*, ___ U.S. ___, ___, 117 S.Ct. 1925, 1936, 138 L.Ed.2d 285 (1997) (citation omitted). Even assuming, without deciding, that compliance with § 2 can be a compelling state interest, in the present case, there is "no 'strong basis in evidence' to conclude that vote dilution, in violation of § 2, would occur in consequence of the [challenged districting] plan[s]" because "none of the three *Gingles* factors, the threshold findings for a vote dilution claim, [have been] established." *Id.* (citations omitted). Specifically, the district court found, without clear error, that plaintiffs failed to prove that: the Native American population is sufficiently large and geographically compact to constitute an effective majority in a single-member district; Native Americans are politically cohesive; and whites vote as a bloc to defeat Native Americans' preferred candidates. Slip op. at 20-21. Because plaintiffs failed to establish a § 2 violation, the

proposed gerrymandered districts cannot survive strict scrutiny.

Finally, the district court did not err in rejecting plaintiffs' proffer of evidence of county-wide voting behavior to prove voter cohesiveness and bloc voting in the School Board and the Village Board elections. While the district court held that the absence of statistical evidence was fatal to plaintiffs' claims, it considered all of the evidence in determining that plaintiffs failed to prove either cohesiveness or bloc voting. *Id.* at 21. The district court concluded that evidence gathered from exit polls in 1994 was inconclusive and failed to prove that minority voters were cohesive or that majority voters voted as a bloc. *Id.* Moreover, a Native American testified at trial that Native Americans have a fair chance of being elected to the School Board and the Village Board. Brief for Appellees at 38, *citing* Tr. Vol. II at 365:21-25. Therefore, the district court did not err in holding that plaintiffs failed to prove that the School Board and the Village Board elections violated either § 2 or the Constitution.

III. Conclusion

We commend the district court for its extremely thorough memorandum opinion. We hold that the district court did not err in ordering Thurston County to create a third majority-minority district for elections of the County Board and rejecting plaintiffs' challenge to the districting plans used for the School Board and the Village Board elections. For the reasons set forth above, we affirm the order of the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

HOLLIS D. STABLER, JR.; SHARON FREEMONT; OMAHA TRIBAL HISTORICAL PROJECT, INC.; and RED FEATHER FAMILY SERVICES, INC. Plaintiffs, v. COUNTY OF THURSTON, NEBRASKA; MARK CASEY, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska; THURSTON COUNTY SCHOOL DISTRICT 13, THURSTON COUNTY, NEBRASKA; KEITH MAHANEY, in his official capacity as President of Thurston County School District 13; VILLAGE OF WALTHILL, NEBRASKA; STEVE DUNN, in his official capacity as Chair of the Village of Walthill Board of Trustees; and PATRICIA HIGGINS, in her official capacity as County Clerk of Thurston County, Nebraska, Defendants.	8:CV93-00394 ORDER AND JUDGMENT (Filed Aug. 29, 1995)

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Plaintiffs are entitled to a districting plan which provides for three Native American majority single-member districts for Thurston County, Nebraska, Board of Supervisor elections;

2) Defendants Thurston County, Nebraska, and Mark Casey, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska, shall have until January 1, 1996, to submit a proposed districting plan to this Court for approval;

3) Plaintiffs' amended complaint is dismissed as to defendants Thurston County School District 13, Thurston County, Nebraska; Keith Mahaney, in his official capacity as President of Thurston County School District 13; Village of Walthill, Nebraska; Steve Dunn, in his official capacity as Chair of the Village of Walthill Board of Trustees; and Patricia Higgins, in her official capacity as County Clerk of Thurston County, Nebraska.

DATED this 29th day of August, 1995.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

HOLLIS D. STABLER, JR.; SHARON FREEMONT; OMAHA TRIBAL HISTORICAL PROJECT, INC.; and RED FEATHER FAMILY SERVICES, INC. Plaintiffs, v. COUNTY OF THURSTON, NEBRASKA; MARK CASEY, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska; THURSTON COUNTY SCHOOL DISTRICT 13, THURSTON COUNTY, NEBRASKA; KEITH MAHANEY, in his official capacity as President of Thurston County School District 13; VILLAGE OF WALTHILL, NEBRASKA; STEVE DUNN, in his official capacity as Chair of the Village of Walthill Board of Trustees; and PATRICIA HIGGINS, in her official capacity as County Clerk of Thurston County, Nebraska, Defendants.	8:CV93-00394 MEMORANDUM OPINION (Filed Aug. 29, 1995)

INTRODUCTION

The Omaha and Winnebago Indian Reservations are located in eastern Thurston County which lies in northeast Nebraska. Accordingly, Thurston County has a substantial Native American population which is concentrated in the eastern half of the county. The Village of Walthill is a small community located in eastern Thurston County. Thurston County School District 13 serves the Village of Walthill and the surrounding area.

Plaintiffs contend that the districting plan used to elect the Thurston County Board of Supervisors ("County Board"), and the method of electing both the school board of Thurston County School District 13 ("School Board") and the Village of Walthill Board of Trustees ("Village Board") violate Section 2 of the Voting Rights Act of 1965[1] and the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States by diluting the voting strength of Native Americans in Thurston County and in Walthill.

The Court conducted a trial on the issues from May 30 – June 2, 1995, and the parties submitted written closing arguments to the Court. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law.

---

[1] 42 U.S.C. § 1973.

LEGAL STANDARDS

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 92 L. Ed. 2d 25, 44, 106 S. Ct. 2752, 2764 (1986). Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973. In enacting the 1982 amendments to the Voting Rights Act, Congress enumerated the following factors relevant to determining whether a violation of § 2 has been established:

> 1. the extent of any history of official discrimination in the state or political subdivision that

touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used [voting practices or procedures] that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiff's evidence to establish a violation are:

whether there is a significant lack or responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying [the voting practice or procedure] is tenuous.

S. Rep. No. 97-417 at 28-29, *reprinted in* 1982 U.S.C.C.A.N. 206-07. Congress emphasized that this list of relevant factors is not exclusive and that there is no requirement that any particular number of factors be proved. The Court in *Gingles* considered these factors, but held that there are three "necessary preconditions" for establishing a § 2 claim:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.
>
> . . . .
>
> Second, the minority group must be able to show that it is politically cohesive.
>
> . . . .
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.

478 U.S. at 50-51, 92 L. Ed. 2d at 46-47, 106 S. Ct. at 2766-67. Although the decision in *Gingles* involved a challenge to multi-member districting scheme, the Court in *Johnson v. De Grandy*, ___ U.S. ___, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994), confirmed that the preconditions apply to challenges of single-member districting schemes and clarified the first precondition:

> When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably

> compact districts with a sufficiently large minority population to elect candidates of its choice.

129 L. Ed. 2d at 789, 114 S. Ct. at 2655. The Court in *Johnson* also explained that while all three *Gingles* factors are necessary to establish a § 2 claim, their existence does not necessarily demonstrate dilution. Instead, a court must examine all relevant circumstances to determine whether in the totality of the circumstances, the electoral law, practice or procedure dilutes the minority group's voting strength. 129 L. Ed. 2d at 791, 114 S. Ct. at 2657. The Court examines plaintiffs' claims pursuant to the foregoing legal principles.

DISCUSSION

(a) Board of Supervisors

In 1979, the Thurston County Board entered into a consent decree as the result of litigation in this Court. Pursuant to the consent decree, the County Board created the current method of election for the County Board of Supervisors. The County Board is composed of seven members, elected from single-member districts, with each member holding a four year term. Members are nominated in partisan primary elections and elected in general elections in even numbered years. Four members (Districts Nos. 1, 3, 5 and 7) are elected in gubernatorial election years, while three members (District Nos. 2, 4 and 6) are elected in presidential election years. The County Board drew the district lines to create two Native American majority districts. This provided Native Americans in Thurston County with representation on the County Board in proportion to their 28.5% of the total

population in 1979.[2] Following the 1980 census, the County Board redistricted and again created two Native American majority districts. At the time, non-whites[3] made up 33.8% of the total population of Thurston County.

According to 1990 census data, Thurston County has a total population of 6936, of which 3046 (43.92%) are Native Americans and 3861 (55.67%) are whites. The voting age population ("VAP") of Thurston County is 4504, of which 1617 (35.9%) are Native Americans and 2862 (63.54%) are whites.

Following the 1990 census, the County Board created the districting scheme which plaintiffs challenge today. Currently, Native Americans constitute a majority of the total population (87.9% and 96.9%) and of the VAP (82.8% and 94.5%) in Districts Nos. 4 and 6, respectively. The other five districts contain majority white populations and VAPs. However, Native Americans represent a substantial portion of the total population (41.2%, 30.9% and 46.3%) and VAP (36.9%, 22.7% and 36.4%) in Districts Nos. 2, 3 and 5, respectively. Only Districts Nos. 1 and 7 contain nominal Native American populations.

---

[2] Two of seven seats = 28.57%.

[3] The "non-white" population of Thurston County is overwhelmingly Native American. According to 1990 census data, there are 29 individuals living in Thurston County who do not fit into either racial category of white or Native American. These persons constitute less than one-half of one percent of the total population of Thurston County. From a statistical standpoint, therefore, the terms "Native American" and "non-white" are virtually synonymous.

Plaintiffs allege that the current districting system packs most of the Native American population of Thurston County into Districts Nos. 4 and 6 and fragments the remaining Native American population among Districts 2, 3 and 5. As a percentage of total population in Thurston County, Native Americans have increased from 28.5% in 1979 to the 1990 figure of 43.92%. Plaintiffs seek the creation of a third Native American majority district to keep pace with the increase of the Native American population in Thurston County.

(i) The Gingles Factors

At trial, plaintiffs presented alternative districting plans for the County Board which include a third Native American majority district.[4] These plans meet the "one person one vote" requirement[5] and were fairly drawn and regularly shaped. Dr. Ronald E. Weber who testified as an expert on behalf of the defendants, conceded that Native Americans in Thurston County are sufficiently large and geographically compact to constitute a majority of voters in a third fairly drawn and non-bizarrely

---

[4] Plaintiffs presented their proposed plans for the County Board, School District 13 Board, and Village of Walthill Board of Trustees through the expert testimony of William S. Cooper.

[5] "One person one vote" requires that districts be of similar size in terms of population to ensure that voters in each district cast a vote of equal strength. Since it is usually impossible to draw districts which have exactly equal populations, courts have recognized that a deviation between districts of 10% or less satisfies the "one person one vote" requirement. *Brown v. Thomson*, 462 U.S. 835, 842, 77 L. Ed. 2d. 214, 220, 103 S. Ct. 2690, 2696 (1983).

shaped single member district for the County Board of Supervisors. However, Dr. Weber's analysis of various elections in Thurston County revealed that while Native Americans were registered to vote in numbers comparable to whites, their turnout at the polls is historically depressed compared to white turnout. This raised a concern in Dr. Weber's mind in terms of creating a third Native American majority district. Dr. Weber testified that due to the depressed turnout rate, the County would have to draw a plan which created Native American districts with supermajorities of about 75% to give Native Americans an effective voting majority. While plaintiffs, proposed plans do create three Native American majority districts, they fall short of providing three 75% supermajority districts.

Both parties' experts analyzed various elections in Thurston County to determine whether Native Americans are politically cohesive and if whites usually vote as a bloc to defeat the Native American candidates of choice. Dr. Gordon G. Henderson (plaintiffs) and Dr. Weber employed both bivariate ecological regression and homogenous precinct[6] techniques to analyze several elections at the county level.[7] In this regard, the parties

---

[6] Homogenous precinct analysis is also known as "extreme case" analysis.

[7] In analyzing these elections, Dr. Weber and Dr. Henderson used different databases. Dr. Weber used signed-in turnout by race as the basis for his regression analysis while Dr. Henderson used voting age population. Nevertheless, both experts' analysis of these elections yielded similar results.

offered analysis of five exogenous[8] county-wide elections between 1978 and 1986 in which a Native American candidate competed against a white candidate. For example, in the 1982 Democratic nomination for sheriff, the Native American candidate (Aldrich) defeated the white candidate (Krahmer). Regression analysis reveals that Aldrich received between 96.1 and 107.5%[9] of the Native American vote and between 9.4 and 12% of the white vote while whites gave Krahmer between 69.1 and 88% of their vote. In the 1982 general election for sheriff, Aldrich received between 124.1 and 126.5% of the Native American vote with white crossover voting of between only 10.8 and 11.7%. On the other hand, the white candidate (Storie) received between 81.9 and 88.3% of the white vote to win the election. Interestingly, the turnout rate of white voters more than quadrupled between the primary and the general elections (14.12 to 57.47%). Similarly, in the 1986 general election for sheriff, the Republican (Obermeyer) and Democrat (Duncan) nominees competed against a Native American running as an independent (Tyndall).

---

[8] An election is "exogenous" if it is held in a jurisdiction other than the one challenged. An election is "endogenous" if it is held in the challenged jurisdiction. Both Dr. Weber and Dr. Henderson testified that the endogenous elections for County Board were not susceptible to regression analysis.

[9] The range is offered as the difference between Dr. Weber's and Dr. Henderson's regression estimates. Both experts testified that regression analysis will occasionally yield estimates in excess of 100% or below 0%. This is especially true in smaller jurisdictions with few precincts. As long as the figures are within reason, the excess or deficiency is of little concern. In this case, for example, the 107.5% merely estimates that most, if not all, Native American voters voted for Aldrich.

Tyndall obtained between 52.6 and 54.2% of the Native American vote and thus was the Native American candidate of choice. He received between 20.9 and 21.3% of the white vote. Obermeyer received between 66.5 and 67.9% of the white vote and 38.1 and 39.3% of the Native American vote to win the election. The parties also analyzed the 1978 non-partisan primary election for District 16 state senator in which the Native American candidate (Stabler) competed against two white candidates. Stabler received between 87.1 and 89.2% of the Native American vote while the white candidate of choice (Moseman) received between 41.5 and 50.8% of the white vote. Moseman won the nomination. Finally, in the 1978 Democratic primary three Native American candidates (Beaver, Stabler, and LaPointe) competed against four white candidates (Jepsen, Welsh, Pearson and Nelson) for four at-large positions on the County Board of Supervisors.[10] Beaver, Stabler and LaPointe respectively received 86.1%, 85.4% and 70.2% of the Native American vote while Jepsen, Welsh, Pearson and Nelson respectively received 81.1%, 82.2%, 80.7% and 64.1% of the white vote. The four white candidates defeated the Native American candidates to win all four positions.

The parties also offered analysis of several County Board of Supervisor district elections. Because Districts Nos. 4 and 6 have Native American majorities, the Court focused primarily on contests in majority white districts in which a Native American ran against a white candidate. In the 1992 general election for District 2, a Native

---

[10] This election was prior to the consent decree. At the time, the County Board was elected in at-large elections.

American (Snowball) ran against Casey, a white candidate. Part of District 2 lies in Winnebago precinct which has a Native American population of 82.06% and VAP of 76.05%. The rest of District 2 lies in Merry and Perry precincts which have white populations of 96.23% and 99.09% and VAPs of 97.4% and 99.09% respectively. Snowball carried that part of District 2 which lies in Winnebago precinct. Casey, however, won the Merry and Perry parts of District 2 to win the election. In every District 2 general election since the 1979 consent decree, the candidate favored by the voters of the Winnebago precinct has lost to the white candidate. Finally, in the 1986 District 3 and 1994 District 5 Democratic primary elections, the Native American candidate was defeated by the white candidate.

Finally, the Court considered two non-partisan contests in the 1986 general election in which a white Native American candidate of choice (or "pro-Indian" candidate) competed against the white candidate of choice. In the State Senator District 16 contest, the pro-Indian candidate (Severns) received between 90.2 and 107.6% of the Native American vote and between 22.8 and 24.5 of the white vote. The white candidate of choice (Korshoj) obtained between 70.4 and 75.5% of the white vote to win the election. Similarly, in the contest for Board of Governors for Northwest Technical Community College, the pro-Indian candidate (May) received between 99.2 and 100.9% of the Native American vote. The white candidate (Ecktenkomp) obtained between 52.8 and 71.6% of the white vote to win the election. Not surprisingly, in both of these contests the pro-Indian candidates received most of their support in the four precincts with high Native

American populations, and little support in the other precincts.[11]

Based on the foregoing, the Court concludes that the Native American population in Thurston County is sufficiently large and geographically compact to constitute a majority in a third fairly drawn and non-bizarrely shaped single-member district. Defendants argue that due to depressed Native American turnout, a third Native American majority district is implausible because the population cannot sustain the "supermajority" needed to elect Native American candidates of choice. However, the Eighth Circuit Court of Appeals recently defused this argument in *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345 (8th Cir. 1995), when it defined a "safe ward" as one in which the minority group has a "practical opportunity to elect the candidate of its choice." Recognizing that a mere majority may not be sufficient, the Eighth Circuit adopted the benchmarks of 65% of total population or 60% of VAP to provide minority voters with an effective voting majority. 54 F.3d at 1348 n. 4. Plaintiffs proposed plans which provide three Native American majority districts meet these thresholds. Furthermore, the Supreme Court explicitly stated that the focus of the first *Gingles* precondition is the *potential* for a minority group to elect representatives of its choice – not the absolute guarantee. 478 U.S. at 50, 92 L. Ed. 2d at 46,

---

[11] Thurston County is divided into eleven voting precincts. Four precincts in the eastern part of the county (Blackbird, Winnebago, Anderson and Omaha) have substantial Native American populations (95%, 82%, 64% and 40% respectively). The other seven precincts have nominal Native American populations.

106 S. Ct. at 2767 n. 17. Accordingly, plaintiffs have demonstrated that Native Americans would constitute an effective voting majority in a third district.

The Court also concludes that plaintiffs have established the second and third *Gingles* preconditions. The analysis of elections in which a Native American candidate ran against a white candidate reveal that Native Americans vote together and choose Native American candidates when given the opportunity. These elections are the most probative of racial voting patterns and demonstrate that Native Americans in Thurston County are politically cohesive. The analysis of the other elections also support these conclusions and both experts' study of all elections indicate that Native Americans overwhelmingly vote for Native American candidates and whites vote for white candidates to defeat the Native American candidate of choice. As the Supreme Court stated in *Gingles*, "[A] white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." 478 U.S. at 56, 92 L. Ed. 2d at 50, 106 S. Ct. at 2769. The presence of this racial polarization and minimal white crossover voting results in a legally significant white bloc vote to defeat Native American candidates of choice.

Dr. Weber confirmed these conclusions on direct examination and in his report. However, Dr. Weber tempered his conclusions by calling the analyzed elections "stale," suggesting that their probative value is weakened by their remoteness in time. Certainly, as elections become more distant in the past, their analysis becomes less reliable regarding voting patterns in the present.

However, the Court finds that the elections which the parties analyzed in this case are not so remote as to become unreliable and they remain probative of current racial voting patterns in Thurston County. After considering the entirety of the parties' analysis covering elections from 1978 to 1992, the Court finds that Native American cohesion, racially polarized voting and white bloc voting have been consistently present in Thurston County over this period. As the Supreme Court stated in *Gingles*:

> Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.

478 U.S. at 57, 92 L. Ed. 2d at 50-51, 106 S. Ct. at 2769.

(ii) Totality of the Circumstances

Having determined that the three *Gingles* preconditions are met, the Court must now examine the totality of the circumstances. In this regard, plaintiffs offered substantial evidence concerning the social, economic and educational condition of Native Americans in Thurston County. From this evidence, it is obvious that Native Americans lag behind whites in areas such as housing, poverty and employment. Plaintiffs also offered evidence regarding overt and subtle racial discrimination in the community. However, Dr. Weber testified that while these conditions exist, they do not appear to preclude Native Americans from participating in the political process

since they are registered to vote in numbers comparable to whites. In addition, defendants offered evidence that Native Americans have enjoyed some success in elections and employment. For example, Marion Tyndall, a Native American, was hired as Chief of Police of the Village of Walthill and is held in high esteem by the residents of that community. Finally, defendants offered testimony that Native Americans are active, well-received and productive members of the community. In short, both parties offered ample evidence directly relating to the several factors identified in the Senate Report.

In *Johnson v. De Grandy, supra,* the Supreme Court held that a single-member districting plan did not violate § 2 when it provided the minority group with effective voting majorities in a number of districts roughly proportional to their share of the voting age population. The Court ruled that the District Court erred in failing to consider proportionality in the totality of the facts when determining whether the plan would deny minority voters equal opportunity. The Court stated:

> While such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

129 L. Ed. 2d at 784, 114 S. Ct. at 2651. And recently, the Eighth Circuit Court of Appeals affirmed a District Court's consideration of proportionality when granting the defendants' motion for summary judgment. *African*

Am. Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345 (8th Cir. 1995). Accordingly, the Court will consider the proportionality issue in the totality of the circumstances.

The Supreme Court's repeated reference to voting age population in *Johnson* indicate a preference for that benchmark in performing proportionality analysis. Similarly, the Court in *Villa* held that the District Court's use of VAP was consistent with *Johnson*. However, neither Court specifically ruled that VAP must be used or that consideration of total population is in error. Accordingly, the Court will consider both total and voting age populations in its proportionality analysis.

As stated above, Native Americans currently constitute 43.92% of the total population and 35.9% of the VAP of Thurston County. Under the existing County Board districting plan, Native Americans are a majority in two districts, or 28.57% of the seven seats. The disparity, therefore, between representation on the County Board and the total Native American population is -15.35% and -7.33% based on VAP. Under plaintiffs' proposed plan, Native Americans would constitute a majority in three districts, or 42.86% of the seven seats. Native American representation would be within -1.06% of the total population and +6.96% based on VAP.

As the Court stated in *Johnson* regarding single-member district dilution claims, "When the question thus comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls." 129 L. Ed. 2d at 792, 114 S. Ct. at 2658. Because the

County Board is only a seven member body, there will be greater disparity between Native American representation and actual population than in *Johnson* and *Villa* where the challenged plans provided the minority group with representation in almost virtual proportion to VAP. This fact makes the decision in the present case a "close call." Nevertheless, the Court in *Johnson* stated that the standard is "roughly proportional." Plaintiffs' proposed plan provides Native Americans with representation on the County Board which is closer in proportion to their total and voting age populations than does the current plan. Considering this and the totality of the circumstances, the Court concludes that the existing districting plan for the Thurston County Board of Supervisors violates § 2 of the Voting Rights Act by diluting the voting strength of Native American voters. Accordingly, plaintiffs are entitled to a districting plan which creates a third Native American majority single member district in accordance with this memorandum opinion.

(b) School District 13 and Village Board of Trustees

The Thurston County School District 13 Board of Education is composed of six members, each holding a four-year term. Three members are elected every two years in a nonpartisan primary election in May and a non-partisan general election held in November. The winners in each primary election are the top six finishers determined by a plurality vote method, while the winners of the general election are the top three finishers, also determined by a plurality vote method. The Village of

Walthill Board of Trustees is composed of five members, holding four year terms. Three members are elected to a term on the board in a non-partisan general election held in May of the gubernatorial election year, while two members are elected in a general election held in May of the presidential election year. The winners in each general election are the top three (or two) finishers determined by a plurality vote method.

Plaintiffs challenge the at-large method of election for the School and Village Boards as violating § 2 and the Constitution and seek the implementation of districting plans for both jurisdictions. Regarding the School Board, plaintiffs offered alternative districting plans. One plan features two, three-member districts while the second features six single-member districts.[12] Regarding the Village Board, plaintiffs offered a plan which features two single-member districts and one three-member district.

For both jurisdictions the parties were able to draw a single-member district in which Native Americans constituted a majority. The boundaries of these districts, however, are highly irregular. As Dr. Weber testified, if it were not for the race consideration, the districts could easily be drawn in a regular fashion. Taking race into consideration, however, he was forced to jump from one census block to another to find sufficient numbers of Native Americans to create a majority single-member district. The end results are racially gerrymandered districts. Such irregularly-shaped districts drawn principally

---

[12] Plaintiffs' "second" plan is actually an attempt by Dr. Weber to create a Native American majority single-member district for the School Board.

for racial considerations run afoul of the Equal Protection Clause. *Miller v. Johnson*, ___U.S. ___, 63 USLW 4726, 115 S. Ct. 2475 (1995); *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993). In addition, the challenged jurisdictions are of such small size that no feasible districting plan can be drawn. The influx of as few as one or two households into or out of a district would disturb the incredibly delicate balance demanded by such a districting scheme. Such a fragile plan is simply unworkable. Accordingly, the Court concludes after considering the proposed plans for both jurisdictions and the expert testimony that plaintiffs cannot prove that Native Americans are sufficiently large and geographically compact to constitute a majority in a single-member district which is regularly drawn and non-bizarrely shaped.

Plaintiffs have failed to prove the first *Gingles* precondition regarding Thurston County School District 13 and the Village of Walthill. Thus, plaintiffs' § 2 claims are defeated on this basis alone. Nevertheless, the Court concludes that plaintiffs were unable to prove the remaining elements of a § 2 claim. The parties were unable to perform regression or homogenous precinct analysis on either School Board or Village Board elections. And while the analysis of county-wide exogenous elections was probative of the claims against Thurston County, the Court has serious reservations about drawing conclusions about racial voting behavior in the school district and Walthill from this analysis. The best analysis that the parties could perform was an exit poll from a recent election. At best, the results of this exit poll was inconclusive about whether Native Americans in the school district and

Walthill are cohesive or whether whites vote as a bloc to defeat Native American candidates of choice.

Finally, the Court must consider plaintiffs' constitutional challenges to the School Board and Village Board. In this regard, plaintiffs must prove racially discriminatory purpose and effect to establish a violation. *Mobile v. Bolden*, 446 U.S. 55, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980). There was no evidence suggesting that a racially discriminatory purpose played any part, let alone constituted a motivating factor in the decision to establish the at-large election systems for the School Board and Village Board. Accordingly, plaintiffs' constitutional challenges must fail.

CONCLUSION

Plaintiffs have established that the current districting plan for the Thurston County Board of Supervisors dilutes the Native American vote and thus violates § 2 of the Voting Rights Act of 1965. Plaintiffs are entitled to a districting plan which provides for three Native American majority single-member districts. Plaintiffs have failed to prove that the at-large methods of election for the school board of Thurston County School District 13 or the Village of Walthill Board of Trustees violates either § 2 or the Constitution of the United States. The Court will enter an order in accordance with this memorandum opinion.

DATED this 29th day of August, 1995.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
District Judge
United States
District Court

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-2964NEO

Hollis D. Stabler, Jr.; Sharon Freemont; Omaha Tribal Historical Project, Inc.; Red Feather Family Services, Inc.,

Plaintiffs-Appellees,

v.

County of Thurston, Nebraska; Mark Casey, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska,

Defendants-Appellants.

Thurston County School District 13, Thurston County, Nebraska; Village of Walthill, Nebraska; Steve Dunn, in his official capacity as Chair of the Village of Walthill Board of Trustees; Patricia Higgins, in her official capacity as County Clerk of Thurston County, Nebraska; Keith Mahaney, in his official capacity as President of Thurston County School District 13,

Defendants.

Appeals from the United States District Court for the District of Nebraska

No. 96-3111NEO

Hollis D. Stabler, Jr.; Sharon Freemont; Omaha Tribal Historical Project, Inc.; Red Feather Family Services, Inc.,

Plaintiffs-Appellants,

v.

County of Thurston, Nebraska; Mark Casey, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska, Thurston County School District 13, Thurston County, Nebraska; Village of Walthill, Nebraska; Steve Dunn, in his official capacity as Chair of the Village of Walthill Board of Trustees; Patricia Higgins, in her official capacity as County Clerk of Thurston County, Nebraska; Keith Mahaney, in his official capacity as President of Thurston County School District 13,

Defendants-Appellees.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court.

December 1, 1997

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED

DEC 23 1997

Supreme Court, U.S.
FILED
APR 15 1998
CLERK

No. 97-1422

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF THURSTON, NEBRASKA AND MARK CASEY, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE BOARD OF SUPERVISORS OF THURSTON COUNTY, NEBRASKA,

Petitioners,

vs.

HOLLIS D. STABLER, JR., SHARON FREEMONT, OMAHA TRIBAL HISTORICAL PROJECT INC., AND RED FEATHER FAMILY SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

MARY WYCKOFF
Osijek, Croatia

NEIL BRADLEY
Counsel of Record
LAUGHLIN MCDONALD
MAHA ZAKI
CRISTINA CORREIA
American Civil Liberties Union Foundation, Inc.
44 Forsyth Street NW
Atlanta, GA 30303
(404) 523-2721

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

QUESTION PRESENTED

Whether the courts below were correct in considering the Native American share of the voting age and total population, both of which showed an underrepresentation of Native American voting strength, as part of the totality of circumstances analysis under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

RULE 29.6 STATEMENT

This brief is filed on behalf of two individuals and two nonprofit corporations, the Omaha Tribal Historical Project, Inc. and the Red Feather Family Services, Inc. These corporations do not have any parent or subsidiary companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

The Claims 1

The Historical Background 2

The Proceedings in the District Court 3

Socio-Economic Disparities 5

Disparities in Employment and Social Segregation .. 5

The Personal Nature of Campaigns 6

Depressed Level of Native American Candidacies... 7

History of Discrimination 7

Both Total and Voting Age Population Information Were Properly Considered by the Courts 8

The Proceedings in the Court of Appeals 10

REASONS FOR DENYING THE WRIT 14

I. THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI ARE NOT PRESENT IN THE RECORD IN THIS CASE... 15

A. Neither Court Below Held that the Existence of Rough or Substantial Proportionality Under Section 2 Should be Determined by Total Population 15

TABLE OF CONTENTS – Continued

Page

B. The Court of Appeals Did Not Hold That "Rough Proportionality" as Defined by *Johnson v. DeGrandy* Cannot Exist If The Disparity in Representation Exceeds Two Percent 16

C. The Court of Appeals Did Not Mandate Proportional Representation 17

II. PETITIONERS SEEK AN ADVISORY OPINION AS TO ISSUES NOT PRESENTED IN THIS LITIGATION 19

III. THE PETITION SEEKS REVIEW OF AN INTENSELY FACTUAL DETERMINATION, A POSTURE THAT DOES NOT MERIT PLENARY REVIEW BY THIS COURT 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

African-American Voting Rights Legal Defense Fund v. Villa, 54 F.3d 1345 (8th Cir. 1995) 9, 11, 12, 16

Ashwander v. TVA, 297 U.S. 288 (1936) 14

Bush v. Vera, 116 S.Ct. 1941 (1996) 19

Elk v. Wilkins, 112 U.S. 94 (1884) 8

Escambia County v. McMillan, 466 U.S. 48 (1984) 14

Flast v. Cohen, 392 U.S. 83 (1968) 20

Hunter v. Underwood, 471 U.S. 222 (1985) 20

Johnson v. DeGrandy, 512 U.S. 997 (1994) ..... *passim*

Neil v. Biggers, 409 U.S. 188 (1972) 20

Omaha Tribe of Nebraska v. Village of Walthill, 334 F.Supp. 823 (D. Neb. 1971), aff'd, 460 F.2d 1327 (8th Cir. 1972) 8

Rogers v. Lodge, 458 U.S. 613 (1982) 19

Rural West Tenn. African-American Affairs Council, Inc. [RWTAA] v. McWherter, 877 F.Supp. 1096 (W.D.Tenn.) (three-judge court), aff'd mem., sub nom. RWTAA v. Sundquist, 516 U.S. 801 (1995) 17

Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997) 14

Texas v. United States, 66 U.S.L.W. 4234 (U.S. Mar. 31, 1997) 20

TABLE OF AUTHORITIES – Continued

Page

Thornburg v. Gingles, 478 U.S. 30 (1986) 3, 4, 10, 16, 17, 18

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984) 14

CONSTITUTIONAL PROVISIONS

First Amendment 1

Thirteenth Amendment 1

Fourteenth Amendment 1, 10

Fifteenth Amendment 1, 10

STATUTES AND RULES

Citizenship Act of 1924, 8 U.S.C. § 1401 8

Rule 10, Rules of the Supreme Court of the United States 15

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 ..... *passim*

STATEMENT OF THE CASE

The Claims

The questions presented by Thurston County and the Chair of the Thurston County Board of Supervisors are not fairly presented in this record. Specifically, this case is not an appropriate vehicle for considering whether dilution claims under Section 2 should be judged by reference to voting age population or total population since the record in this case clearly establishes the underrepresentation of Native American voting strength under either measure. Likewise, petitioners' contention that this case reflects a mistaken reliance on notions of proportional representation is belied by the record and the express holding of the court below.

Plaintiffs-respondents are Native American voters and organizations who challenged the single-member district plan of the Thurston County, Nebraska, County Board of Supervisors.[1] The claims were brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the first, thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States.

---

[1] Plaintiffs also challenged the at-large methods of electing the governing bodies of a village (Walthill) and school board (District 13) within Thurston County. Judgment was entered for those defendants and those claims are not before this Court.

Defendants below who are not before this Court are Thurston County School District 13 and its chair Keith Mahaney, Village of Walthill, Nebraska and the chair of its board of trustees Steve Dunn, and Patricia Higgins, county clerk of Thurston County.

The Historical Background

In 1979 the Thurston County Board of Supervisors entered into a consent decree in a lawsuit brought by the United States alleging dilution of the votes of Native Americans. The seven single-member districting plan adopted by the decree included two majority Native American districts based on a 1975 Native American population of 28.5 percent. Pet. App. 30. Despite increases in the Native American population, the county redistricted twice (after the 1980 and 1990 censuses) retaining only two majority Native American districts. In 1980, nonwhites (being almost exclusively Native Americans) made up 33.8% of the population. In 1990, Native Americans constituted 43.92% of the total population and 35.9% of the voting age population (VAP). Pet. App. 30, 31. Between 1980 and 1990, the total population *decreased* by 250 persons, from 7,186 to 6,936. The white population decreased by 898 persons; the Native American population *increased* by 619 persons. Pet. App. 31; Pl.Ex. 100, T. 77, 79).

The challenged plan was drawn by the chair of the county board of supervisors, Mark Casey, with the assistance of the county attorney who had worked on the 1979 consent decree. Casey testified "[w]e didn't pay any attention at all to the data broke down by race . . . " T. 697.

Plaintiffs claimed that the plan diluted Native American votes by both packing and cracking the Native American population. As the district court found:

> Native Americans constitute a majority of the total population (87.9% and 96.9%) and of the

> VAP (82.8% and 94.5%) in Districts Nos. 4 and 6, respectively. The other five districts contain majority white populations and VAPs. However, Native Americans represent a substantial portion of the total population (41.2%, 30.9% and 46.3%) and VAP (36.9%, 22.7% and 36.4%) in Districts Nos. 2, 3 and 5, respectively.

Pet. App. 31.

The Proceedings in the District Court.

Plaintiffs presented evidence to establish vote dilution under Section 2 following *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its progeny. The evidence established that: (1) Native Americans are sufficiently large and geographically compact to constitute a majority in three of seven single member districts; (2) Native Americans are politically cohesive; and (3) the majority votes sufficiently as a block usually to defeat the candidates favored by the minority. To support their claim of vote dilution "based on the totality of circumstances," plaintiffs introduced evidence of a history of discrimination, the extent to which minorities have been elected to office, the extent to which the minority voters bore the effects of discrimination which hinder their ability to participate effectively in the political process, and evidence of the presence of other factors that enhanced the opportunity for discrimination. *Gingles*, 478 U.S. at 44-45; *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994).

Following a four day trial in which the testimony of lay and expert witnesses was heard along with more than 150 exhibits, the district court held for plaintiffs on their vote dilution claim under Section 2. The court first held

that plaintiffs established the three *Gingles* factors. Pet. App. 32-39. Even defendants' evidence established their presence. Defendants' expert conceded that a third compact district could be drawn. Pet. App. 32-33, 37; T. 456-57. Similarly, defendants' expert testified "that candidates of choice of Native American voters appear to have been usually defeated due to non-Native American bloc voting." T. 612.[2] The average white cross-over vote for Native American candidates was 11%. T. 200. The district court found:

> After considering the entirety of the parties' analysis covering elections from 1978 to 1992, the Court finds that Native American cohesion, racially polarized voting and white bloc voting have been consistently present in Thurston County over this period.

Pet. App. 39. The county did not contest the presence of the three *Gingles* factors on appeal, Pet. App. 14, and do not challenge them in this Court.

The county did challenge the adequacy of the additional evidence going to the existence of vote dilution under the totality of circumstances test. This evidence included the following.

---

[2] Defendants generated turnout data that showed a consistent pattern across elections of severely depressed Native American voter turnout. In the three primary and three general elections between 1988 and 1992, the average Native American turnout was 20.2% of voting age population and the average white turnout was 54.3%. (Pl.Ex.157, T. 212; Pl.Ex. 173, T. 555, 558.)

Socio-Economic Disparities Socio-economic data from the 1990 census established great disparities between Native Americans and non-Native Americans in Thurston County. (Pl.Ex. 60 through 69, T. 70; 70 through 78, T. 76-77; and 112, T. 80-81.) Per capita income of Native Americans is 36% that of whites ($3,996 vs. $11,043); more than 57% of the Native American households earn less than $15,000 compared to 35% of whites; in 1989 55% of Native Americans lived below the federal poverty level compared to 12% of whites; 32% of Native Americans 16 years of age and over in the labor force were unemployed compared to 3% of whites. Native Americans in Thurston County have significantly higher rates of morbidity and mortality than do white residents. According to the Indian Health Service, the infant mortality rate for the Omaha-Winnebago service unit was nearly twice that of the United States and of the State of Nebraska and the age-adjusted mortality rate from all causes was nearly three times that of the United States. (Pl.Ex. 143, T. 83-4; Pl.Ex. 144, T. 83-4, received by order of June 6, 1995, docket entry 142.)

Disparities in Employment and Social Segregation Though more than a third of the county's adult population is Native American, only one of the 50 employees of Thurston County was Native American. Deposition of Chairman Mark Casey, pp. 39-40, Pl.Ex. 165, T. 395-96. T. 751-52.

Native Americans and whites live separately in addition to socializing and worshiping separately. Pet. App. 17. Two-thirds of all Native Americans reside in census blocks which are 90% or more Native American; over 80% of whites reside in census blocks which are 90% or more

white. This segregation also extends to voting precincts in the county. (Pl.Ex. 55, T.14; 55A, T. 65; 55B, T. 65; 56, T. 14.) As the court of appeals noted,

> Thurston County, School District 13, and the Village each employ only one Native American, and social organizations in Thurston County are not racially mixed. Consequently, the white majority has little interaction with most Native American candidates, and, therefore, the opportunity to become known as a person and to be trusted with public office is not equal.

Pet. App. 17.

The Personal Nature of Campaigns Social segregation is particularly significant in Thurston County because political campaigns are primarily reputation and word of mouth. Little or no advertising is done. Elected officials testified that what is important is how well known you are in the community before the campaign, that voters vote for "candidates that they know and trust." T. 378; T. 132, 138, 140, 310, 660. They attributed their vote-getting ability to long personal and family standing in the community. T. 379, 659, 661. Elected officials testified that they "just signed up," that they did not really campaign, that they spent no money on their campaigns. T. 359, 660, 726.[3]

---

[3] The only Native American to ever be elected by a majority white electorate within Thurston County, Edwin McCauley, was elected to the defendant school board after this suit was filed. Like white elected officials, he testified he did not campaign. He was well known because he had served as a county supervisor, being elected from a majority Native American single member district in 1980 and 1984. He lost an at-large county supervisor election in 1972. T. 358, 368.

In comparison, Charles Merrick, a Native American who twice ran unsuccessfully for his district school board in Thurston County testified about his experience with a white neighbor:

> . . . I had a neighbor, he since has left, . . . he was out walking up the street one day and I talked with him and he asked me if I was running for the school board and I told him I was.
>
> He said, "I'm fearing for the school board. If Indians get up there it's going to go to hell and I'm going to move."

T. 311-12; Pet. App. 19.

Depressed Level of Native American Candidacies Few Native Americans have been elected to office in Thurston County. At the implementation of single-member districts in 1980, a Native American ran for District No. 4 (a majority Native American district) and was defeated. No Native American has since offered for that seat. (Plaintiffs do not claim that District 4 fails to provide Native Americans the opportunity to elect the candidate of their choice.) District 6, the other majority Native American district, has continually been represented by a Native American since its inception. Only three Native Americans have run in a majority white district, all unsuccessfully.

History of Discrimination The district court took judicial notice of various statutes, treaties and court decisions which reflected a history of discrimination against Native Americans in Nebraska and Thurston County. (Docket entry 116, requests 1-15, 21-23, 28-30, 33. T. 9-10.) Legislation prohibited Native Americans from voting

unless they "owned real estate and are entirely freed from all tribal relations," 1867 Neb. Laws 20, excluded Native Americans from counting for state legislative apportionment, outlawed marriages and divorces among Indians held according to Indian custom, 1913 Neb. Laws 201-03, and repeatedly banned the possession by or sale to "Indians or half breeds" of ammunition, fire-arms and liquor up through 1943. 1943 Neb. Laws 419-20. Indians did not gain citizenship by virtue of the fourteenth amendment. They were not made citizens until the Citizenship Act of 1924, 8 U.S.C. § 1401.[4]

In 1985, the county board of supervisors adopted a resolution opposing the Winnebago tribe's effort to have criminal and civil jurisdiction over the reservation. Thurston County's representative in the Nebraska legislature opposed Native American jurisdiction, while conceding in his testimony before the state legislative judiciary committee that "[t]he racial discrimination faced by the Winnebago in Thurston County is a burden thrust on them by the white man for hundreds of years, and I would have to be blind or foolish to suggest that it doesn't exist on the Reservation today." (Pl.Ex. 82, p. 9, admitted to show the legislator made the statement, Order of June 6, 1995, Docket entry 142.)

Both Total And Voting Age Population Information Were Properly Considered by the Courts As part of the totality of circumstances inquiry, the district court also

---

[4] See *Elk v. Wilkens*, 112 U.S. 94 (1884); *Omaha Tribe of Nebraska v. Village of Walthill*, 334 F.Supp. 823, 834 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972).

addressed what became the primary defense – the argument that the existing apportionment provided Native Americans with districts roughly proportional to their presence in the county. The district court applied the holding of *Johnson v. DeGrandy*, that proportionality "is a relevant fact in the totality of circumstances." Pet. App. 40, quoting *DeGrandy* at 1000. The district court also considered *DeGrandy's* discussion of what constitutes the relevant population and concluded that this Court's "repeated reference to voting age population in *Johnson* [*v. DeGrandy*] indicate[d] a preference for that benchmark in performing proportionality analysis." Pet. App. 41. It also noted that the Eighth Circuit approved the use of voting age in *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345 (8th Cir. 1995) (*Villa*). Pet. App. 41. In view of these cases, the district court held that it would be appropriate to "*consider* both total and voting age population in its totality analysis." Pet. App. 41 (emphasis added). It noted that three majority Native American districts of seven would be closer in proportionality to their presence in *both* voting age and total population than the current two minority districts. Native American voting age population of 35.9% and total population of 43.92% are both closer to 42.86% (3 of 7) than to 28.57% (2 of 7). *Id.* Considering this along with all of the other evidence in the totality of circumstances analysis, the district court found that the current plan diluted Native Americans' voting rights in violation of Section 2 of the Voting Rights Act.

The county subsequently drafted a seven single member district plan with three majority Native American districts. The court ordered the plan into place and

directed the plan be implemented in the 1998 election. Order of June 6, 1996, Docket entry 170.

Having found a violation of Section 2 under which plaintiffs could secure all of the relief that might also be available under the fourteenth and fifteenth amendments, the district court had no need to address the constitutional claims and did not do so. In the petition to this Court, though the county correctly recites that "[t]he district court made no findings regarding the plaintiffs' claim that the County had engaged in intentional discrimination," it inaccurately contends that plaintiffs' constitutional claim was rejected by the district court. Pet. 8 and 22, n.6.

The Proceedings in the Court of Appeals

The county appealed but, as noted, conceded the findings that plaintiffs established the three *Gingles* factors. Pet. App. 14. The county contended that there were insufficient findings under the "totality of circumstances test" but that was rejected by the court of appeals; the appellate court also determined that the district court's findings were not clearly erroneous. *Id.* 14-18.

The court of appeals rejected the county's argument that the district court had confused "the concepts of 'proportional representation' and 'proportionality'" as discussed in *Johnson v. DeGrandy*. Pet. App. 11-12. The county's contention that the district court sought to guarantee proportional representation, the election of a set number of Native American candidates, is inconsistent with the record. The district court was aware that District 4, a majority Native American district, had always elected

a white county commissioner, and that plaintiffs did not challenge the ability of Native Americans in that district to elect their candidate of choice. The district court approved the county's remedial plan in which two of the three majority Native American districts have Native American populations, both total population and VAP, that are *lower* than that of the original District 4 which has *never* elected a Native American. Docket entries 159 and 170.[5] The court of appeals was correct in rejecting the county's argument that the district court misunderstood the proviso to Section 2 against guaranteeing that a set number of minority individuals are elected.

The county argued that the district court was wrong to consider total population at all and that its two majority-minority district plan already provided "substantial proportionality" under *DeGrandy*. The court of appeals specifically addressed the county's contention that the district court erred in its use of both total and voting age population and in its consideration of proportionality. Pet. App. 12. The court of appeals did not reject its own precedent that approved the use of voting age population. *African Am. Voting Rights Legal Defense v. Villa*, 54 F.3d 1345, 1353 (8th Cir. 1995) ("the district court's use of voting age population was consistent with *Johnson* [*v. DeGrandy*] and was not error"). The court of appeals

---

[5] That district was 87.9% Native American in total population and 82.8% in VAP. The remedial plan adopted by the county and approved by the court actually *lowered* the Native American percentages in District 4 to 85.1% total and 79.6% VAP. New District 5 has a total Native American population of 79.8% and a VAP of 73.1%.

essentially held the use of total population was not error because Native Americans were underrepresented under both population measures. It held:

> Under the current plan, Native Americans are under-represented by more than 7% considering VAP and 15% considering total population. Under the district court's plan, Native Americans would be over-represented by less than 7% considering VAP and under-represented by less than 1.5% considering total population. Whether we consider the total population or the VAP, the proposed three majority-minority districts plan results in less disparity than the current plan and more closely approximates rough, or substantial, proportionality, as discussed in *Johnson*, 512 U.S. at 1023, 114 S.Ct. at 2662 in which the Supreme Court upheld a districting plan with approximately a 2% population disparity, and in *Villa*, 54 F.3d at 1353, in which this court approved a districting plan with less than a 1% disparity.

Pet. App. 12-13. Contrary to the assertion made by the county, the court of appeals did *not* hold that rough proportionality "cannot exist" when the underrepresentation of minority voters "is more than 2%." Pet. 17. Nor did the court of appeals decide, as put in the first question presented by petitioners, Pet. i, 9. that "the existence of 'proportionality' should be determined on the basis of the minority's share of the total population." The court of appeals merely affirmed the holding of the district court that total population information, along with voting age population, is relevant to the Section 2 inquiry.

The court of appeals also rejected the county's argument, which it also makes to this Court, that "substantial

proportionality" should be defined as "the maximum number of majority-minority districts possible without exceeding proportionality." Pet. App. 13. The court of appeals held:

> Only in a rare case will the population ratios match the fractions of the number of districts such that one group is not over-represented. There is no reason why the Native American minority in this case should continue to bear the burden of under-representation under the current scheme while the white majority enjoys over-representation. The creation of a third majority-minority district will not harm non-Native Americans because the evidence does not show that Native Americans vote as a bloc to defeat white voters' candidates of choice. Moreover, the evidence indicates that Thurston County intentionally discriminated against Native Americans because it failed to make adjustments during the 1990 redistricting process in response to the information gathered in the 1990 census demonstrating a shift in the population's racial composition due to the increased Native American population. This evidence shows that Thurston County maintained its current districting system with a discriminatory intent and thwarted Congress's purpose in amending §2 in 1982 to provide "equally open" political processes. *See Johnson*, 512 U.S. at 1018-19, 114 S.Ct. at 2660-61.

Pet. App. 13-14.

The county repeatedly contends, erroneously, that the district court rejected plaintiffs' constitutional claims, implying that the court of appeals' finding of intentional discrimination is inconsistent with the district court's

judgment. As noted above, the district court made no findings on intentional discrimination, and having found a statutory violation it had no need to address the constitutional claims. The district court followed proper jurisprudence and addressed plaintiffs' statutory claim first. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 157-58 (1984); *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). The court of appeals properly determined that the evidence indicated that Thurston County intentionally discriminated against Native Americans as part of its reasoning in affirming the judgment below, a ground presented as an additional basis for affirmance. Brief of Appellees, Cross Appellants, at 33, *Stabler v. County of Thurston*, 129 F.3d 1015 (8th Cir. 1997). Neither court reached out to issue a ruling on the unnecessary question of whether the evidence also established a constitutional violation.

REASONS FOR DENYING THE WRIT

None of the questions presented by the petition are in fact presented by the record. The court of appeals did *not* hold that total population must be, or in fact was in this case, the measure of rough proportionality. The court of appeals did *not* hold that rough proportionality cannot exist where the disparity in minority voter representation is more than two percent. And the court of appeals did *not* mandate proportional representation. Further, petitioners do not contend that the court of appeals' decision conflicts with that of any other circuit. (The conclusion of the petition states that the rulings of the court of appeals

"are at odds . . . with the holdings of most other lower courts," Pet. 24, but the petition does not identify any.)

The decisions by the two courts below addressed a factually developed record and correctly applied the "totality of circumstances" analysis under Section 2 of the Voting Rights Act as developed through decisions of this Court.

Petitioners seek review by arguing that the issues they frame should be clarified to resolve issues that may arise in the redistricting following the year 2000. But those issues are not presented in this litigation and are merely a request for advisory opinions. Nothing in the petition merits review under Rule 10 of this Court.

I. THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI ARE NOT PRESENT IN THE RECORD IN THIS CASE.

A. Neither Court Below Held that the Existence of Rough or Substantial Proportionality Under Section 2 Should be Determined by Total Population.

The opinions below make absolutely clear that neither the district court nor the court of appeals considered total population as anything more than additional evidence to the voting age population in the assessment of whether the challenged plan provided Native Americans with rough or substantial proportionality, as that term was defined in *Johnson v. DeGrandy*, as part of the totality inquiry. Both courts found that Native Americans were underrepresented under both population figures. The

county's argument is flatly inconsistent with what the courts actually did.

Additionally, this Court has held that Section 2 analysis requires the trial court

> to consider the totality of circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters.

Gingles, 478 U.S. at 79 (internal quotations and citations omitted). The county has not suggested any reason total population should be excluded from the assessment of the totality of circumstances.

B. The Court of Appeals Did Not Hold That "Rough Proportionality" as Defined by *Johnson v. DeGrandy* Cannot Exist If The Disparity in Representation Exceeds Two Percent.

The county's argument that the court of appeals held that rough proportionality cannot exist when the difference between the minority's share in the population and the percentage of districts in which Native Americans are a majority exceeds two percent is simply of whole cloth. The citation by the court of appeals of *Johnson v. DeGrandy* and *Villa* which approved districting plans with disparities of 1-2% cannot be credibly interpreted as meaning the court of appeals held disparities larger than that were impermissible. See Pet. App. 12-13.

This Court has rejected arguments for inflexible rules in the application of Section 2, *Johnson v. DeGrandy*, 512 U.S. at 1018 ("[a]n inflexible rule would run counter to

the textual command of § 2"); *Gingles*, 478 U.S. at 58 ("there is no simple doctrinal test for the existence of legally significant racial bloc voting"), and none was applied here.[6]

C. The Court of Appeals Did Not Mandate Proportional Representation.

The opinions of both courts below reflect a careful consideration of the factual record. Nothing in either opinion suggests that either court applied a standard of mandatory proportional representation.

Though the county quotes the language from *Johnson v. DeGrandy* which explains the difference between the "proportional representation" proviso of Section 2 and the concept of proportionality which links the number of majority-minority districts to the minority members' share in the relevant population, the county continues to merge these distinct concepts. Petitioners view the creation of a remedy which provides rough proportionality as forbidden "proportional representation for minority groups," Pet. 22, and consider the concepts interchangeable. Pet. 23. It is petitioners who are confused. The

---

[6] The county asks this Court to adopt an inflexible test for substantial proportionality, defined as "substantial proportionality exists when a legislature has created the maximum number of majority-minority districts possible without exceeding proportionality." Pet. 19. This definition is from *Rural West Tenn. African-American Affairs Council, Inc. [RWTAA] v. McWherter*, 877 F.Supp. 1096, 1107, n. 12 (W.D.Tenn.) (three-judge court), *aff'd mem., sub nom. RWTAA v. Sundquist*, 516 U.S. 801 (1995). This inflexible test would bar a 19% minority in a five district jurisdiction from any Section 2 claim.

decision below is clear and consistent with prevailing law.

We have discussed above in Section I.B. that the petition presents no issue regarding "proportional representation" as that concept is used in Section 2 and as elucidated by *Johnson v. DeGrandy*. This section addresses the county's contention that the court of appeals rotely mandated rough proportionality.

There was nothing automatic about the court of appeals' consideration of any of the evidence, or of its review of the district court's finding that the consideration of proportionality weighed in favor of plaintiffs as a relevant part of the totality of circumstances analysis. The district court found, and the court of appeals affirmed, the presence of Native American vote dilution after first finding the presence of the three *Gingles* factors and then proceeding to the totality inquiry. As a relevant part of this inquiry, both courts considered proportionality as directed by *Johnson v. DeGrandy*. In its review the court of appeals also found evidence of intentional discrimination. The county's argument that the finding of intentional discrimination was made "*solely* on the basis of the County's failure to provide Native Americans with proportional representation," Pet. 21 (emphasis in original), is an inaccurate oversimplication. The court of appeals did not reach its conclusion in a vacuum. It did *not* rule that merely because demographics would allow for a third majority-minority district that the county had to draw it. It did find, in a county with extreme racially polarized voting, adherence to the status quo of two majority-minority districts while ignoring data showing a

54% increase in the Native American share of the population was evidence that indicated intentional discrimination. *See Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (affirming finding that system was maintained for discriminatory purposes). *Compare Bush v. Vera*, 116 S.Ct. 1941, 1969 (1996) (O'Connor, J., concurring, noting that in view of case law going back to 1966 "it would be irresponsible for a State to disregard the § 2 results test.")

The courts below did not run afoul of *Johnson v. DeGrandy's* rejection of rough proportionality as a safe harbor defense. That theory was rejected in part because it might be an "irresistible inducement" to create majority-minority districts "even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. at 1019-20. In contrast here, a third district was found to be necessary on the basis of a full record showing the presence of vote dilution. If there is "irresistible inducement" in this judgment, it is only the inducement to comply with the Voting Rights Act, as written by Congress and interpreted by this Court in *Johnson v. DeGrandy* and elsewhere.

Once again, the issue the county seeks to raise is not presented on this record.

II. PETITIONERS SEEK AN ADVISORY OPINION AS TO ISSUES NOT PRESENTED IN THIS LITIGATION.

For the reasons discussed in Section I above, petitioners are in reality seeking review of issues that are not fairly presented in this record. They contend that such

issues should be clarified because they may arise in the redistricting throughout the country following the year 2000. Petitioners are seeking advisory opinions that are not presented as actual controversies in this litigation. Consequently, the petition does not present reviewable questions. *See, Flast v. Cohen*, 492 U.S. 83, 95 (1968) ("no justiciable controversy is presented . . . when the parties are asking for an advisory opinion"). *Cf. Texas v. United States*, 66 U.S.L.W. 4234 (U.S. Mar. 31, 1997).

III. THE PETITION SEEKS REVIEW OF AN INTENSELY FACTUAL DETERMINATION, A POSTURE THAT DOES NOT MERIT PLENARY REVIEW BY THIS COURT.

This Court does not usually undertake to review the concurrent findings of two lower federal courts, *Neil v. Biggers*, 409 U.S. 188, 193, n. 3 (1972), or reverse "view[s] that the Court of Appeals could properly take of the evidence." *Hunter v. Underwood*, 471 U.S. 222, 232 (1985). The district court and the court of appeals properly performed their functions in the intensely factual analysis presented by a Section 2 claim, and did so consistently with the precedents of this Court. No purpose would be served by review in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY WYCKOFF
Osijek, Croatia

NEIL BRADLEY
Counsel of Record
LAUGHLIN MCDONALD
MAHA ZAKI
CRISTINA CORREIA
American Civil Liberties
Union Foundation, Inc.
44 Forsyth Street NW
Atlanta, GA 30303
(404) 523-2721

Counsel for Respondents

(3)

Supreme Court, U.S.
FILED
APR 23 1998
OFFICE OF THE CLERK

No. 97-1422

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF THURSTON, NEBRASKA, and MARK CASEY, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska,

Petitioners,

vs.

HOLLIS D. STABLER, JR.; SHARON FREEMONT; OMAHA TRIBAL HISTORICAL PROJECT, INC.; and RED FEATHER FAMILY SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

Submitted by:

NEAL E. STENBERG
Counsel of Record
HARDING, SHULTZ & DOWNS
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11pp

TABLE OF CONTENTS

Page

ARGUMENT 1

1. THIS CASE VERY SQUARELY PRESENTS SUBSTANTIAL QUESTIONS RELATING TO THE EXISTENCE OF ROUGH PROPORTIONALITY IN VOTE DILUTION CASES BROUGHT UNDER THE VOTING RIGHTS ACT 1

(a) The Issue of Whether the Existence of Rough Proportionality Should Be Determined on the Basis of Voting-Age Population Is One Which Is Clearly Presented Under the Facts in this Case 1

(b) The Holding of the Eighth Circuit Court of Appeals that Rough Proportionality Did Not Exist When Determined on the Basis of Voting-Age Population Is Clearly Wrong 2

(c) Resolution of the Issues in this Case Would Not Require the Court to Engage in Any Intensive Fact Finding 5

(d) Thurston County Is Not Seeking an Advisory Opinion From this Court 7

TABLE OF AUTHORITIES

Page

CASES

African American Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345 (8th Cir. 1995) 1, 7

Johnson v. DeGrandy, 512 U.S. 997 (1994)..... 2, 4, 5

STATUTES, REGULATIONS AND RULES

42 U.S.C. § 1973..... 5

ARGUMENT

1. THIS CASE VERY SQUARELY PRESENTS SUBSTANTIAL QUESTIONS RELATING TO THE EXISTENCE OF ROUGH PROPORTIONALITY IN VOTE DILUTION CASES BROUGHT UNDER THE VOTING RIGHTS ACT.

(a) The Issue of Whether the Existence of Rough Proportionality Should Be Determined on the Basis of Voting-Age Population Is One Which Is Clearly Presented Under the Facts in this Case.

The County respectfully suggests that the Eighth Circuit was clearly wrong in holding that rough proportionality did not exist in this case when judged on the basis of voting-age population. If that is true, then it follows that the decision of that court must be reversed unless the existence of rough proportionality can properly be determined on the basis of total population. Thus, the proper population base to be used for determining the existence of proportionality is an issue which is squarely presented by the County's petition for a writ of certiorari in this case.

The decision of the Eighth Circuit with regard to this issue was plainly contrary to the decisions of other courts which have considered the question. Indeed, in *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1352 (8th Cir. 1995) the Eighth Circuit noted that:

> *Johnson* clearly stands for the proposition that voting age population is a relevant population for proportionality purposes despite *Johnson's*

> refusal to hold that it is the only relevant population. Subsequent cases have unanimously interpreted *Johnson* as approving the use of voting age population as a relevant population. *See, e.g., NAACP v. Austin*, 857 F. Supp. 560, 569 (E.D. Mich. 1994) ("In assessing proportionality we use voting-age population figures, as the Supreme Court did in *DeGrandy*."); *see also Shaw v. Hunt*, 861 F. Supp. 408, 440 n.28 (E.D.N.C.), petition for cert. filed, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923); *Vera v. Richards*, 861 F. Supp. 1304, 1339 n.49 (S.D. Tex.) (three-judge district court), appeal filed, 63 U.S.L.W. 3388 (U.S. Oct. 31, 1994) (No. 94-805).

(b) The Holding of the Eighth Circuit Court of Appeals that Rough Proportionality Did Not Exist When Determined on the Basis of Voting-Age Population Is Clearly Wrong.

In their brief, the plaintiffs assert that the record "clearly establishes" the underrepresentation of Native-American voting strength measured on the basis of voting-age population. That is a remarkable statement which only serves to emphasize the rather profound confusion surrounding the concept of "rough" or "substantial" proportionality.

In *Johnson v. DeGrandy*, 512 U.S. 997 (1994), this Court held that:

> [N]o violation of § 2 can be found here, where, in spite of continuing discrimination and racial-bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. . . .

Id. at 1000.

The facts in this case are that Native Americans constitute 35.9 percent of the voting-age population in Thurston County. They effectively control 28.57 percent of the seats on the County Board of Supervisors, which is 7.33 percent less than perfect proportionality. They want to control 42.85 percent of the seats, which is 6.95 percent more than perfect proportionality.

These facts clearly presented the Eighth Circuit with a situation where the "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' . . . share[ ] in the voting-age population. . . . " *Id.* The Eighth Circuit Court of Appeals held that rough proportionality, judged on the basis of voting-age population, did not exist on these facts. How did the Court arrive at that conclusion? In the brief which they submitted to the Eighth Circuit Court of Appeals, the plaintiffs argued that:

> *DeGrandy* upheld a legislative districting plan where the proportion of majority-minority districts was within one or two percentage points of matching the proportion of minorities in the population. *Johnson v. DeGrandy*, 114 S.Ct. at 2663. This Court in *African American Voting Rights Legal Defense v. Villa*, 54 F.3d 1345, 1353 (8th Cir. 1995), applied *DeGrandy's* roughly proportional concept to mean representation at near parity, upholding a plan with proportionality within 1-2% of the minority population presence. The *Villa* Court noted that the difference there was "half of the 2.0% difference approved in *Johnson [v. DeGrandy]*." *Id.* Neither *DeGrandy* nor *Villa* provide support for denying plaintiffs a remedy where they are underrepresented by

> more than 7% considering voting age population. . . .

Plaintiffs' Eighth Circuit Brief at p. 30. The plaintiffs were very clearly arguing that rough proportionality, judged on the basis of voting-age population, did not exist because the minority was "underrepresented" by more than the "2.0% difference approved in *Johnson*." *Id.* It is clear that the Eighth Circuit agreed with this argument. (App. 12-13.)

The Eighth Circuit also said that rough proportionality did not exist because "the proposed three majority-minority districts plan results in less disparity than the current plan and more closely approximates rough, or substantial, proportionality, as discussed in *Johnson*." *Id.* In other words, rough proportionality, judged on the basis of voting-age population, did not exist because the 7.33% "underrepresentation" created under the current plan deviated from absolute proportionality by 38/100s of 1% more than the 6.95% overrepresentation created by a three majority-minority district plan. This sort of reasoning served as the foundation for the Eighth Circuit's conclusion that the County had unlawfully diluted the voting strength of Native-American voters. The County respectfully suggests that the Eighth Circuit's analysis finds no support whatsoever in the *Johnson* decision, and will serve to promote considerable confusion in this area of the law if left uncorrected.

(c) Resolution of the Issues in this Case Would Not Require the Court to Engage in Any Intensive Fact Finding.

The courts below erred in basing their conclusions concerning the existence of proportionality on incorrect legal standards. If this Court finds that to be the case, then the Court can either reverse the judgment of the Eighth Circuit Court of Appeals, or remand the case to the district court for reconsideration under proper legal standards.

It is very unlikely that a remand would be necessary. In *Johnson v. DeGrandy, supra* at 1000, this Court held that ordinarily no violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, can be found

> where, in spite of continuing discrimination and racial-bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. . . .

In *Johnson,* the plaintiffs presented a particularly strong case under the totality of the circumstances test. Nevertheless, this Court easily determined as a matter of law the plaintiffs had failed to prove a violation under § 2 of the Voting Rights Act. The argument presented by the plaintiffs in this case was marginal at best, leading the district court to characterize its decision as a "close call." (App. 42.) The facts which the plaintiffs claim in their brief to have proved are a far cry from the actual findings of fact made by the district court. For example, the district court did not find that there was a history of official discrimination in Thurston County that touched the right

of the members of the minority group to register, to vote, or otherwise to participate in the democratic process. The plaintiffs sought to make that showing by asking the court to take judicial notice of numerous purported facts. That request was rejected by the district court in its entirety. Though given specific instructions by the district court concerning the necessity to do so, the plaintiffs never made any further effort with respect to their request that the court take judicial notice concerning these matters. (Tr. Vol. I at 8-10; 11:6-21).

The plaintiffs have also grossly exaggerated the strength of the case which they presented with respect to other matters. They mention purported economic disparities between Native Americans and non-Native Americans, but have totally ignored the findings made by the district court to the effect that "while these conditions exist, they do not appear to preclude Native Americans from participating in the political process since they are registered to vote in numbers comparable to whites." (App. 39-40.) The plaintiffs have also ignored the findings made by the district court that Native Americans "are active, well-received and productive members of the community;" and that "Native Americans have enjoyed some success in elections and employment." (App. 40.) In short, if the Court determines in this case that Native-American voters in Thurston County form effective voting majorities in a number of districts roughly proportional to their share in the relevant population, then the Court should have little difficulty in finding that the plaintiffs failed to prove a violation of § 2 of the Voting Rights Act as a matter of law.

(d) Thurston County Is Not Seeking an Advisory Opinion From this Court.

The plaintiffs' claim that Thurston County is seeking an advisory opinion in connection with this matter is absurd. The County seeks only justice with respect to the specific case which is currently before the Court. The County has merely suggested that the Court should hear this case because the decision of the Eighth Circuit will serve to create considerable confusion regarding the concept of rough proportionality; is contrary to the decisions of other courts which have held that the existence of rough proportionality should be determined on the basis of voting-age population; and is contrary to the Eighth Circuit's own decision in *African American Voting Rights Legal Defense Fund, Inc. v. Villa, supra* at 1352-53.[1] A real case and controversy exists with respect to this case. The fact that the Court's decision in this case would also provide much needed guidance in an extremely complex

---

[1] In *African American Voting Rights Legal Defense Fund, Inc. v. Villa,* the Eighth Circuit Court of Appeals held as a matter of law that, where rough proportionality existed when determined on the basis of voting-age population, evidence indicating that rough proportionality did not exist when determined on the basis of total population was insufficient to create a genuine issue of fact.

area of the law is not, as the plaintiffs suggest, a reason for this Court to deny the County's petition.

COUNTY OF THURSTON, NEBRASKA; MARK CASEY, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska, Defendants

NEAL STENBERG – 14025
Counsel of Record
HARDING, SHULTZ & DOWNS
800 Lincoln Square
P.O. Box 82028
121 S. 13th Street
Lincoln, NE 68501-2028
(402) 434-3000